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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 194

ABRAHAM BAKER,
PETITIONER,

v.

SIMMONS COMPANY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Reasons for granting the writ	5
Conclusion	10
Appendix A: Statutes	11
B: Opinions and judgment below	13
C: Conflicting opinion	47

CITATIONS:

Cases:

Anchor Serum Company v. *Federal Trade Commission*, 217 F 2d 867 (1954)	5
Baker v. *Simmons*, 307 F.2d 459 (1962)	5
Berger v. *United States*, 255 U.S. 22, 35	10
Cott Beverage Corporation v. *Canada Dry Ginger Ale Inc.*, 146 F. Supp. 300, 303 (S.D.N.Y. 1956); appeal dismissed 243 F.2d 795 (2d Cir. 1957)	8
Dehydrating Process Co. v. *A. O. Smith Corp.*, 292 F.2d 653, 655, cert. den. 368 U.S. 391 (1 Cir. 1961)	7
E. I. Dupont Nemour & Co. v. *Purofied Down Products Corp.*, (D.C.N.Y. 1959) 176 Fed. Supp. 68	9
Forstman Woolen Co. v. *Alexanders Dep't. Stores Inc.*, 11 F.R.D. 405, 407 S.D.N.Y. 1951	8
Forstman Woolen Company v. *Murray Sices Corp.*, 10 F.R.D. 367	8
Hamilton Brown Shoe Co. v. *Wolf Bros. Co.*, 240 U.S. 251, 257-258	2

Page

International Salt Co. v. *United States*, 332 U.S. 392 (1947) 6

Leader Clothing Co. v. *Fidelity & Cas. Co. of N. Y.*, 10th Cir. 1956 237 F.2d 7 9

Northern Pacific Railway Co. v. *U. S.*, 356 U.S. 1 (1958) 6

G. D. Searle & Co. v. *Institutional Drug Co. Distributors Inc.*, 151 F. Supp. 715 S.D. Calif. 1957 8

Times Picayune v. *U. S.*, 345 U.S. 594 (1953) 6

Timken Roller Bearing Co. v. *U. S.*, 341 U.S. 593, 599 (1951) 7

Toledo Scale Co. v. *Computing Scale Co.*, 261 U.S. 399, 418 2

Statutes:

15 U S C Sec. 1115 (b), Section 33 b (7) of the Trade Mark Act of 1946 ..... 3, 11

15 U S C Sec. 14, Section 3 of the Clayton Act 3, 7, 11

15 U. S. C. Sec. 1, Section 1 of the Sherman Act 3, 12

Miscellaneous:

"The Anti-Trust Defense in Trade Mark Infringement Actions", 45 Va. L. R. 94 (1959) 8

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on April 2, 1965, affirming the District Court's order and judgment on damages and judgment entered July 20, 1962 affirming the District Court's issuance of an injunction.

Citation to Opinions Below

The Order of the District Court issuing an injunction (I, 611 Case No. 5962)[1] is printed in Appendix B hereto

[1] References are to the certified copy of the record as follows: Case No. 5962: Vol. I, II (Record Appendix to Brief for Appellant) Vol. III, IV (Record Appendix to Brief for Appellee) Case No. 6137:

infra p. 46. Its findings of Fact and Conclusions of Law (I; 599, ibid) are reported at 200 F. Supp. 149 (D. Mass 1961). The opinion of the Court of Appeals affirming that order (IV 1071 ibid) is printed in Appendix B hereto, infra p. 13 and is reported at 307 F.2d 458. The Judgment of the District Court, entered March 13, 1963, awarding damages, appears at I, 21 Case No. 6137. The opinion of the Court of Appeals vacating that judgment and remanding the case is printed in Appendix B infra p. 35 and reported at 325 F.2d 580 (1st Cir. 1963). The Order and Judgment of the District Court entered June 8, 1964, on damages (I, 82-83 Case No. 6383) is printed in Appendix B hereto infra p. 44 and is not reported. The Opinion of the Court of Appeals affirming that Order (II 91 ibid) is printed in Appendix B hereto infra p. 41 and is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered April 2, 1965 (II, 93 Case No. 6383) p. 43 infra. Jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1), as is jurisdiction to reach back and correct errors in affirmance of the issuance of injunction in Case No. 5927, *Hamilton Brown Shoe Co.* v. *Wolf Bros. Co.*, 240 U.S. 251, 257-258; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418.

Questions Presented

1. Whether respondent, which controls twenty per cent of the United States mattress market, and has entered into tying arrangements found to be within the meaning of Section 3 of the Clayton Act with its customers for the ex-

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Combined Volume (Record Appendices to Brief for Appellant and to Brief for Appellee), Case No. 6383: Vol. I (Record Appendix to Brief for Appellant) Vol. II (Record Appendix to Brief for Appellee.)

clusive use of its mattresses, is exculpated from a violation of the Clayton Act, because actuated by a "proper motive".

2. Whether, in an action for unfair competition and trade-mark infringement under the Lanham Act (15 U. S. C. 1114 et seq), proof of plaintiff's use of the mark to violate the anti-trust laws constitutes a bar to the action.

3. Whether petitioner was prejudiced in his right to a fair hearing and denied due process of law when the District Court Judge, upon remand of the case to the District Court for assessment of damages, in a conference before the master, called defendant a "crook" and otherwise excoriated him, while the hearing before the master was in progress.

Statutes Involved

The statutory provisions involved are Section 1 of the Sherman Act 15 U. S. C. Section 1; Section 3 of the Clayton Act 15 U. S. C. 14; Section 33 b (7) of the Trade Mark Act of 1946, 15 U. S. C. 1115 b (7). They are printed in Appendix A *infra* pp. 11, 12.

Statement

On October 10, 1958 respondent instituted in the District Court an action for unfair competition and trade-mark infringement, seeking to enjoin defendants, from using the name "Simmonds" in connection with the business of selling upholstering or reupholstering or otherwise servicing furniture and for damages. Petitioner denied infringement (I, 17 Case No, 5289) and set up as defenses respondent's laches, violations of the anti-trust laws, and unclean hands as bar to the action. The trial was before McCarthy J., lasted fifty (50) days, and resulted in Findings of Fact and Conclusions of Law (I, 599 *ibid*) and an Injunction (I, 611) both entered November 16, 1961 enjoining petitioner and others from using the name "Simmonds" or "any other

name which would lead the public to believe that defendants are associated with plaintiff''. On July 20, 1962, the Court below affirmed the District Court's judgment and remanded the case to that court for the allowance of counsel fees (Case No. 5962) p. 13 *infra*.

Thereafter, on remand, the District Court on December 20, 1962 (R 5, Case No. 6137) awarded respondent $136,-868.77 for counsel fees and disbursements, and referred respondent's claim for damages to a master (R 4, *ibid*). The Master filed a report (R 6, *ibid*) recommending damages to the extent of some $475,000.00 (R 6, *ibid*) which the District Court doubled, to which it added counsel fees, and entered judgment for respondent of $1,094,779.94 (R 20-21, *ibid*). On December 26, 1963, the Court below vacated the judgment of the District Court and remanded the case to the District Court for further proceedings because of irregularities by the master in reliance upon an expert witness *in camera* in the preparation of his report (R 105, *ibid*).

Thereafter, on January 30, 1964, the District Court referred the case to the same master who filed his Second Report (I 75 Case No. 6383) affirming the findings of damages made in his initial report. The Court (McCarthy, J.) made statements to counsel for respondent, during a conference before the master, terming petitioner a crook, seeking bankruptcy, ''who admitted committing perjury before me and before the Registration Office in Washington'' (I 36, *ibid*). Petitioner objected to the Second Report of the master on the ground of prejudice by the District Court and the master and resulting denial of due process (I, 81 *ibid*). The Court (Chief Justice Sweeney in place of McCarthy, J. deceased) confirmed the master's Second Report, ordered the findings of damages doubled, added counsel fees and entered judgment against defendant, as in Case No. 6137 for $1,094,779.94 (I, 82, 83 *ibid*).

The Court below on April 2, 1965 affirmed the judgment of the District Court (I 91 *ibid*). p. 41 *infra*.

Reasons for Granting the Writ

1. The decision of the court below in *Baker* v. *Simmons*, 307 F2d 459, (1962) Case. No. 5962 conflicts in principle with the decision of the Court of Appeals for the Seventh Circuit in *Anchor Serum Company* v. *Federal Trade Commission*, 217 F 2d 867 (1954). Appendix C. p. 47 *infra*.

In *Anchor Serum*, the petitioner made contracts with certain customers for the sale of hog serum with the proviso that in consideration of the use of the sellers' trade name, "Anchor", these customers agreed to purchase all their requirements of serum from the seller.

In the case at bar, respondent leased signs bearing its trade name "Beautyrest by Simmons" to its hotel and motel customers, on condition that the lessees buy all their mattresses from respondent.

In *Anchor Serum*, the Seventh Circuit rejected the contention that the contracts were necessary in order to insure the proper use and protection of petitioner's trade name. It held that Section 3 of the Clayton Act made no provision for such contingencies, and that such contention, if adopted, would permit an easy avoidance of Section 3.

> "Nothing more would be required by the contracting parties, irrespective of the effect which their contract might have upon competition than that there be included in the contract the right or privilege on the part of the purchaser to use the trade name of the seller." (*Ibid* at 871)

In the case at bar, the court below held precisely to the contrary, that the proper use and protection of the respondent's trade name justified " 'tying' or conditioning

the use of its signs on the purchase of its mattresses" (IV 1091 Case No. 5962).

> "In short, where the clear import of the sign program was to convey the message that a Beautyrest awaited the traveler inside, the Simmons Company had ample justification to insure that the realization met this expectation". (*Ibid* 1091).

In *Anchor Serum*, the Seventh Circuit held that "there was no legal issue . . . as to whether the contracts were illegal *per se;* the only legal issue . . . was whether the contracts with their restrictive provisions were calculated to have the proscribed effect or consequences" (217 F 2d at 870) of substantially lessening competition, tending to create a monopoly or impeding a substantial amount of competitive activity.

In the case at bar, the court below did not reach this issue. Instead, it stopped short, on the basis that the respondent had "a legitimate business justification as opposed to an improper motive . . . an eminently legitimate interest to protect in 'tying' or conditioning the use of the signs on the purchases of its mattresses . . . a right, indeed, a duty, to insure the truthfulness of its advertising and to exclude the possibility that a careless or capricious innkeeper might short change his guests with a different mattress." (at 1091).

It referred to a dispute between the parties, and lack of finding by the District Court on whether the volume of commerce affected by the sign-mattress arrangements should be regarded as substantial within the meaning of *International Salt Co.* v. *United States,* 332 U.S. 392 (1947); *Times Picayune* v. *U. S.,* 345 U.S. 594 (1953); *Northern Pacific Railway Co.* v. *U. S.,* 356 U.S. 1 (1958) and "whether Simmons 20 per cent of the mattress market in the United

States gave them sufficient economic power to impose an appreciable restraint on free competition in the tied product." (R 31) But it declined to decide these questions, because it found that respondent was exculpated from the reach of the anti-trust laws, because actuated by a proper motive (I 1089-1090 *ibid*).

2. Clearly, the question presented is important in the administration of the federal anti-trust laws. The court below has already held in *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 292 F 2d 653, 655, cert. den. 368 U.S. 391 (1 Cir. 1961) that "proper motive" takes business arrangements, otherwise literally within the language of the Act, out of the reach of the Act and is apparently committed to the concept of "proper motive" as an exculpating principle. If "truth in advertising" or proper use and protection of a trade name justify a violation of the anti-trust laws, the matter should, in the public interest, be settled by this Court and the conflicting decisions of the Courts of Appeal for the First and Seventh Circuits be resolved.

3. The decision of the Court below is believed to be erroneous and the conflicting decision of the Seventh Circuit Court of Appeals in *Anchor Serum Co.* v. *F. T. C., supra* correct. In *Timken Roller Bearing Co.* v. *U. S.*, 341 U.S. 593, 599 (1951), this Court said

> "A trade mark cannot legally be used as a device for Sherman Act violation. Indeed, the Trademark Act of 1946 itself penalizes use of a mark 'to violate the anti-trust laws of the United States' ".

The decision of the court below permits the use of a mark or name to justify Clayton Act violation, on the basis that truth in advertising is a proper motive and exculpates violation. As the Court in *Anchor Serum supra* rightly observed, Section 3 of the Clayton Act makes no provision

for such a contingency. We submit that there is no good reason in legislative history or the policy of the anti-trust laws to read such an exculpating principle into the Act.

4. The question presented as to whether proof of a violation of the anti-trust laws constitutes a complete defense to an action for trade mark infringement under the Lanham Act is important in the administration of the Lanham Act and has not been, but should in the public interest, be resolved by this Court.

Mr. Justice Black's reference in *Timken Roller Bearing Co., supra*, to the Act of 1946 does not resolve the question of what penalty the Act imposes on the use of a trade mark to violate the anti-trust laws. There are conflicting decisions and dicta in the lower courts, to the effect, on the one hand, that a mark which has become incontestable under the provisions of the Lanham Act may not be enforced where it has been or is being used to violate the anti-trust laws (*Forstman Woolen Company* v. *Murray Sices Corp.*, 10 F. R. D. 367; *G. D. Searle & Co.* v. *Institutional Drug Co. Distributors Inc.*, 151 F. Supp. 715 S. D. Calif. 1957; *Forstman Woolen Co.* v. *Alexanders Dep't. Stores Inc.*, 11 F. R. D. 405, 407 S. D. N. Y. 1951) and to the effect, on the other hand, that the Lanham Act deprives a misuser of a trade mark of certain evidentiary advantages but it does not strip him of his mark nor constitute a complete defense to a trade mark infringement action. *Cott Beverage Corporation* v. *Canada Dry Ginger Ale Inc.*, 146 F. Supp. 300, 303 (S. D. N. Y. 1956) appeal dismissed 243 F 2d 795 (2d Cir. 1957). See *"The Anti-Trust Defense in Trade Mark Infringement Actions"* 45 Va. L. R. 94 (1959).

The court below did not reach this question, in view of its determination that respondent had engaged in no violation of the anti-trust laws. The question, so far as petitioner can ascertain, has not been resolved. The importance of both trade marks and competition in contemporary

American life and commerce justify the allowance by this Court in the public interest of the petition on this score.

5. This Court in the exercise of its supervisory powers over the lower federal courts has, in this case, the opportunity to establish the necessary criteria for relations between the District Courts and masters appointed pursuant to F. R. C. P. Rule 53, and also to correct a wrong caused by the intemperate, prejudiced and unfounded attack on a litigant by the District Judge. The District Judge, McCarthy, J., in a telephone conference transcribed at the hearing before the master termed petitioner a "crook", seeking bankruptcy, who has admitted committing perjury before me and before the Registration Office in Washington (I, 36 Case No. 6383). The petitioner has not sought bankruptcy and the record is barren of any evidence that he admitted committing perjury before Judge McCarthy or anyone else. The court below held that in view of its opinion in the 1962 case, (Case No. 5962) "we scarcely think the judge's remarks could have had prejudicial effect on him. In addition, the record fails to indicate any bias or prejudice by the master himself. We therefore need not reach the question of whether the district judge's remarks amounted to a showing of bias and prejudice". (I 92 Case No. 6383)

This holding raises but does not resolve the problem. The provisions of F. R. C. P. Rule 53 make the master's findings of fact "armoured with a strong presumption of validity" *E. I. Dupont Nemour & Co.* v. *Purofied Down Products Corp.*, (D. C. N. Y. 1959) 176 Fed. Supp. 68 "which should not be disturbed because trial court has a different opinion or is dissatisfied with master's findings" *Leader Clothing Co.* v. *Fidelity & Cas. Co. of N. Y.*, 10th Cir. 1956 237 F 2d 7. The necessary effect of such an intemperate attack upon the petitioner by the district judge is to violate the impartiality required of the master and

thus to vitiate both the master's findings and the district judge's action thereon. ". . . the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurances that they are impartial. . ." *Berger* v. *United States*, 255 U.S. 22, 35. The district judge's bias can reasonably be deemed to extend back to the trial in Case No. 5962 and to have permeated his conduct in the succeeding trials. It can reasonably be deemed to have affected his conduct in doubling the master's award of damages against petitioner in Case No. 6137 and to have affected his judgment in passing on petitioner's motions to strike evidence and other motions in each of the trials.

The court below says that the master could not have been prejudiced by the district judge in Case No. 6383 because the district judge made findings against petitioner which the court below upheld in Case No. 5962. This bootstrap logic solves nothing. If the district judge was prejudiced, which the court below refused to decide, he was prejudiced all the way and his findings against the petitioner in Case No. 5962 cannot be used to justify the lack of effect of his prejudice on the master in Case No. 6363. The proper role of district judge and master requires definition by this Court. More important, petitioner's right to a fair hearing requires review by this Court of the action of the district judge and of the court below in failing to meet this challenge to the integrity of the judicial process.

Conclusion

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,
MAURICE SCHWARTZ
Counsel for Petitioner

May 18, 1965

Appendix A

Statutes Involved

15 U S C § 1115 (b) If the right to use the registered mark has become incontestable under Section 1065 of this title, the registration shall be conclusive evidence of the registrants exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the affidavit filed under the provisions of said Section 1065, subject to any conditions or limitations stated therein except where one of the following defenses or defects is established. . . .

(1) That the mark has been or is being used to violate the anti-trust laws of the United States July 5, 1946 c 540, Title VI § 33, 60 Stat 438, Oct. 9, 1962 Pub. L. 87-772 § 18, 76 Stat 774.

15 U S C § 14 It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

15 U S C § 1 Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in Sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1. 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

Appendix B

United States Court of Appeals
For the First Circuit

No. 5962.

ABRAHAM (ABE) BAKER AS AN INDIVIDUAL AND ALSO D/B/A SIMMONDS UPHOLSTERING COMPANY, SIMMONDS UPHOLSTERING CO., INC., SIMMONDS SALES SYSTEM, INC. AND NEW ENGLAND UPHOLSTERING CO., INC.,

DEFENDANTS, APPELLANTS,

v.

SIMMONS COMPANY,

PLAINTIFF, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[200 F.Supp. 149]

Before HARTIGAN and ALDRICH, *Circuit Judges,* and GIGNOUX, *District Judge.*

C. Keefe Hurley, with whom *Earle C. Cooley* was on brief, for appellants.

Francis A. Even, with whom *William E. Anderson*, *Michael S. Dukakis*, *Soans, Anderson, Luedeka & Fitch* and *Hill, Barlow, Goodale & Adams* were on brief, for appellee.

OPINION OF THE COURT,
July 20, 1962.

HARTIGAN, *Circuit Judge.* This is an appeal from an injunction issued by the District Court of the United States for the District of Massachusetts on November 16, 1961 in an action involving trademark infringement and unfair competition.

Plaintiff, appellee — the Simmons Company — is one of the nation's leading manufacturers of mattresses and box springs. Plaintiff's predecessor company first began manufacturing beds and bed springs for the public under the name Simmons in 1899. In 1959 plaintiff had a business volume of $132,600,000. It now sells approximately twenty per cent of all the mattresses sold in the United States. Simmons average annual advertising expenditures is about $2,000,000. While it manufactures furniture for a variety of purposes and rooms, the overwhelming majority of its productive efforts and advertising are directed towards the marketing of products possessing a "sleep feature."[1]

Every product leaving the plaintiffs plants bears the name "Simmons." On objective record evidence, it was demonstrated that the Simmons name is well known to the American public, and its reputation is good.

The individual defendant's name is Abraham Baker. Baker is the sole owner of two of the corporate defendants, Simmonds Upholstering Co., Inc., and New England Upholstering Co., Inc. He also held the controlling shares in the Simmonds Sales System, Inc. All corporate defendants were organized under the laws of Massachusetts. Defendants are in the reupholstering business and their history is as follows:

In 1935 Baker opened a retail furniture business in Lawrence, Massachusetts, under the name "Baker Furniture Co." This venture, under the Baker name, apparently continued as a small retail outlet until 1945. Some time around 1940, Baker started a reupholstering operation as an adjunct to and in the same building as his

[1] For example, of plaintiff's 1959 sales volume $28,000,000 was attributable to the sale of the Simmons "Hide-A-Bed" and other dual purpose equipment which, while designed for living room use, could be quickly converted to a bed.

furniture business. This new venture was styled the "Simmonds Upholstering Company." At the time that the "Simmonds" name was selected, the Baker Furniture store was solvent and according to Baker's testimony enjoyed a good reputation in the community.

Baker operated the "Simmonds Upholstering Company" as a sole proprietorship until 1952. In that year, defendant Simmonds Upholstering Co., Inc., which had been incorporated in 1950, became active in the reupholstering business. This corporation serves as the vehicle for selling reupholstering service to the public, purchasing fabrics, delivering the finished product, and financing the entire reupholstering operation. Defendant, New England Upholstering Company, is the manufacturing branch of Baker's corporate group and does the actual reupholstering. Defendant, Simmonds Sales System, Inc., now defunct, was organized in 1950 for the purpose of granting franchises to individual established reupholsterers so that they might operate under the name "Simmonds Upholstering Company." Franchises were granted in New York City and Albany, New York, New Jersey and in Pittsburgh and Detroit.

The advent of World War II, with its restrictions on the production of new living room sets possessing springs, proved a great boon to the reupholstering business. Baker's operations expanded significantly during this period and have continued to prosper through the years. In 1959 the defendants' annual volume from reupholstering services was $2,486,546.80.

With the demise of its franchise system the defendants' market for reupholstering service is concentrated primarily in the New England states and in the area of Albany, New York. Defendants advertise extensively throughout this area through the media of newspaper, radio, television and direct mail. Defendants do not main-

tain retail outlets for their reupholstering services but rely on home calls by the Simmonds sales force. In defendants' words, the thrust of the Simmonds advertising is to offer "such an attractive combination of low price, extra Value and premiums, that the prospective customer will pick up the telephone and call a branch office to request a visit from a salesman."

On October 10, 1958 plaintiff initiated the present action alleging unfair competition and trademark infringement and seeking to enjoin the defendants from using the name "Simmonds" and for other relief. Defendants denied infringement, asserted the affirmative defenses of laches and estoppel, that the defendants and their predecessors had been doing business under the name Simmonds since 1899, and thus had rights in the name "Simmonds" paramount to any which the plaintiff might have in "Simmons." Defendants further alleged that they neither sold nor manufactured goods of the kind manufactured by the plaintiff. Subsequently defendants amended their answer to assert the additional defense that plaintiff's "Beautyrest" Sign Program for motels was violative of certain provisions of the Sherman and Clayton Anti-trust Acts.

In September 1960 the defendants moved for summary judgment on the basis of their affirmative defenses, supported by affidavits, interrogatories and answers, together with pre-trial depositions. Plaintiff countered with deposition testimony bearing directly on the affirmative defenses as well as revealing substantial issues of fact. The court denied the motion for summary judgment.

In a motion by the defendants for reconsideration of the court's action relative to summary judgment, the defendants admitted for the sake of the motion, all of the facts asserted by the plaintiff in any and all of the pleadings and papers filed by the plaintiff. The court, thereafter,

reaffirmed its denial of summary judgment as a matter of law.

Trial began on September 21, 1960. On the fifth day of trial the defendants moved again to further amend their answer to plead as a further defense an alleged violation by the plaintiff of Section 2(d) of the Clayton Act as amended by the Robinson-Patman Act. The trial lasting fifty days ended on March 3, 1961.

On November 15, 1961 the trial court entered its findings of fact and conclusions of law and on the following day enjoined the defendants "from using the name 'Simmonds' and from using any other name or representation which would lead the public to believe that defendants are associated with the Plaintiff."

In issuing the instant injunction the district court made the following crucial finding of fact:

"E. CONFUSION

"21. I find on all the evidence that the name 'Simmonds' as it has been used in the conduct of the DEFENDANT'S business is indistinguishable when spoken from 'Simmons', has been of a most confusing character, and that its use by the Defendants has not only in the past, but is likely in the future to cause confusion among the purchasing public in New England and elsewhere."

This finding and the ramifications thereof are central to the present action.

In an action for infringement of a protected trademark or name the test is that of confusing similarity. Thus under the Lanham Act it is incumbent upon a court to determine whether a defendant's use of the contested mark is likely to cause confusion or mistake or to deceive purchasers as to "the source of origin of [the plaintiff's] goods or services." § 32 (1) 15 U.S.C. § 1114(1). Moreover, "What has

been said respecting infringement applies as well to the cause of action for unfair competition, which is but a somewhat broader phase of the same wrong. The gist of this action is the likelihood that the goods of the defendant will be passed off as those of the plaintiff. [citing cases]." *Standard Brands* v. *Smidler*, 151 F.2d 34, 37 (2 Cir. 1945). In sum, both actions, i.e., trademark infringement as well as unfair competition, in addition to according legal protection to the property right which has been established in a given name, seek to insure that the public is not misled into purchasing or utilizing goods or services different from those sought by the pull and lure of a subtly devised parody of a familiar name or symbol. To put it more directly, one cannot ride on the coattails of another's reputation where the indicia of that reputation is legally protected. As was stated in *LaTouraine Coffee Co.* v. *Lorraine Coffee Co.*, 157 F.2d 115, 118 (2 Cir. 1946), cert. den. 329 U.S. 771:

> "The Supreme Court has pointed out the law's recognition of the 'psychological function of symbols' in protecting trademarks, adding that once the owner has impregnated 'the atmosphere of the market with the drawing power of a congenial symbol' then the owner can obtain redress 'if another poaches upon the commercial magnetism of the symbol he has created.' Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 316 U. S. 203, 205, 62 S.Ct. 1022, 1024, 86 L.Ed. 1381."

Plaintiff's trademark "Simmons" is registered in the United States Patent Office under Registration No. 137,699 dated November 30, 1920, Renewed November 30, 1940; Registration No. 532,319 dated October 24, 1950 and Registration No. 548,280, dated September 18, 1951.[2]

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[2] "Simmons" is also included under Registration No. 661,772 in combination with another of plaintiff's trademarks, "Beautyrest." The mark embraced by Registration No. 661,722 is "Sleep Best on Beautyrest by Simmons."

With the "Simmons" name in the market place since 1899 trademarked since 1920, and enjoying a good reputation for quality sleep and allied products, the question is whether the advent of a reupholstering firm styled "Simmonds" in the 1940's had the proscribed proclivity of engendering a "likelihood of confusion" in the public mind. The district court held that such proclivity existed. We agree with that finding.

Defendants' attack on the trial court's finding of likelihood of confusion takes several tacks. Initially, defendants dwell at length on asserted distinctions between the operations of Simmons and Simmonds, arguing that the cumulative effect of these distinctions militate against the likelihood of a misled or duped public. These alleged distinctions range from the obvious, e.g., Simmons as a manufacturer of new sleep products to Simmonds as a purveyor of reupholstering services, down through the more attenuated ones of the nature and purposes of advertising and class of clientele of the respective parties. The upshot, in defendants' view is that the dissimilarity in product use and marketing practice exclude the likelihood of substantial consumer confusion.

We can bypass consideration of the inferences to be drawn from a lack of strict functional interchangeability[3] because the zone of protection which the law extends in

[3] Although on this score the record indicates that defendants regarded new furniture as their prime competitive factor and thus at least in the area of Simmons' substantial market for the living room —based "Hide-A-Bed," the two concerns were face to face in direct competition. Moreover, since 1958 Simmons has operated a separate Living Room Division. It might be noted in passing that while defendants have consistently maintained that its business is the selling of reupholstering services and not the manufacture of new furniture, this distinction may be more illusory than real. The record indicates that it frequently happened that customers who sent their old living room sets to the defendants for "refinishing" received back a new set in the sense that no constituent thereof, e.g., frame, etc. had ever before been in the customer's home.

this area is far broader and frequently reaches to the area of what might be termed noncompeting goods. Thus producers of "V-8" vegetable juice cocktail could enjoin the use of "V-8" vitamin tablets. *Standard Brands v. Smidler, supra.* Manufacturers of the "Yale" lock could enjoin attempted introduction of a "Yale" flashlight. *Yale Electric Corporation* v. *Robertson,* 26 F.2d 972 (2 Cir. 1928); as could the producer of fountain pens compel a similar result in the case of a razor blade manufacturer. *L. E. Waterman Co.* v. *Gordon,* 72 F.2d 272 (2 Cir. 1934). In fine, "The protection which the law gives the owner of a trade mark is not confined to the goods upon which it is, or has been, used by the owner of it but extends to products which would be reasonably thought by the buying public to come from the same source if sold under the same mark (citations omitted). His mark is the brand by which his goods can be identified, and when it is used by another the reputation of his mark, and consequently his own business reputation, are placed to that extent beyond his control. Unless the use by that other is upon goods so unlike his own or in territory so far from that which he has exploited that it will not create confusion, it will be enjoined." *Standard Brands* v. *Smidler, supra,* at 37.

We feel that upon a consideration of the totalities of the environmental and marketing context that reupholstering services and the production of mattresses and allied sleep products possess a relationship sufficiently viable to invoke the familiarly accepted legal principles outlined above. *Standard Brands* v. *Smidler, supra; L. E. Waterman Co.* v. *Gordon, supra; Yale Electric Corporation* v. *Robertson, supra.* See *Triangle Publications* v. *Rohrlich,* 167 F.2d 969 (2 Cir. 1948); *Hanson* v. *Triangle Publications,* 163 F.2d 74 (8 Cir. 1947); Restatement, Torts, § 731.

Assuming, then, a relationship sufficient for protection, defendants next argue that plaintiff introduced no "com-

petent'' evidence on the pivotal question of confusion. As noted above, the trial of this case occupied some fifty days of litigation, during which time the court, sitting without a jury, admitted a plethora of evidence on the confusion issue, over the objection of the defendants and subject to a motion to strike at the close of the trial, which motion was ultimately denied. On appeal, defendants center their attack on the admission of much of the evidence.

While we believe that several of the defendants' evidentiary points are well taken and that consequently portions of the evidence should have been excluded, a careful review of the voluminous record of trial convinces us that there was sufficient competent and substantial evidence adduced at the trial to satisfy the standard of a likelihood of confusion and to render the admission of some disputed evidence non-prejudicial.

Actual examples of confusion were not required. *La-Touraine Coffee Co.* v. *Lorraine Coffee Co., supra; George W. Luft Co.* v. *Zande Cosmetic Co.,* 142 F.2d 536 (2 Cir. 1944). And the competent evidence of record denoting confusing similarity amply satisfies us that the findings of the district court on the question of a *likelihood* of confusion are not clearly erroneous.

At the trial four former Simmonds employees testified as to instances of the confusing similiarity which they had personally experienced relative to the respective names. A certain William Canner, formerly in charge of the overall sales operation of defendant, Simmonds Upholstering Co., testified that he recalled instances when potential Simmonds customers would inquire of him as to whether the defendant was the Simmons Mattress Company. He stated that he received these inquiries at such various places as Boston and Lawrence, Massachusetts, Albany, New York, and Hartford, Connecticut. David Levine, who had formerly been in charge of training the entire Sim-

monds sales force, also testified that he had received inquiries from potential customers as to the connection between the Simmonds Upholstering Company and the Simmons Company. Lucien Jutras, one-time Simmonds sales manager for the State of Maine and a portion of New Hampshire, also testified as to inquiries which he had received as to the connection between Simmons and Simmonds. Finally, Wilfred Dupuis who had served as Simmonds' office manager in Hartford, Connecticut, and later as a Simmonds salesman in Lowell, Massachusetts, also confirmed personal experiences denoting potential customer confusion obtaining between the Simmons—Simmonds name.

Among the literature which the Simmonds Company produced for its sales trainees was a booklet entitled "Questions and Answers; Objections and How to Overcome Them." The purpose of this booklet was stated therein: "The mark of a successful salesman is to have a *convincing answer* at the tip of his tongue to any question or objection which a customer may offer. Very often such questions or objections can be *anticipated* by the trend of conversation and these objections can easily be knocked out by a complete knowledge of your subject." (emphasis in original)

Thereafter, the very first question which the Simmonds Company apparently felt it essential that the salesman anticipate was the following:

> "Q. Are you the Simmons Mattress Company? A. No, Mam, we are the Simmonds Upholstering Company, the world's largest reupholsterers. The Simmonds (sic) Mattress Company is a good company, the leaders in the mattress field. We are the world's largest and the leaders in the reupholstering field."

There is little question that the sample customer inquiries and suggested replies contained in the foregoing booklet,

which was introduced at the trial, were based on past salesmen's experience. The fact that the very first question to be "anticipated" by the Simmonds salesman dealt with the relationship between Simmons and Simmonds speaks volumes as to the doubtful state of the public mind on this question and on the frequency with which the question was raised. Proclivity towards confusing similarity cannot be gainsaid.

Baker himself readily recognized the names Simmons and Simmonds as a fertile source of potential confusion to prospective customers. From 1951 through 1957 in Providence, Rhode Island, one Abraham Adler operated businesses styled variously as "H. Simmons Upholstering Co." and "H. Simmons Decorators." In October 1957 in the Superior Court of Rhode Island, defendant Simmonds Upholstering Co., Inc., successfully enjoined Adler from using the Simmons name in connection with his enterprises. The bill of complaint in the Rhode Island action, introduced here, was personally signed by Baker. It states in effect that the name Simmons and Simmonds are one and the same or at least would be regarded as such by prospective customers in the relevant market. In the language of defendant's complaint:

> ["Simmonds Company states] . . . that the use of these names (Simmons) as associated with this particular business tends to mislead, confuse and deceive the general public and the customers of your Complainant because (a) the business operations of the Respondent under both said trade names are of the same type as those carried on by your Complainant, and because (b) the Respondent has appropriated the name of your Complainant, Simmonds, and is using it in said business operation as "Simmons," which is phonetically the same although spelled slightly different."

"6. That your Complainant has no business connection with the Respondent, but the use of said name, Simmons, by the Respondent has and will continue to deceive, confuse and mislead your Complainant's customers and the general public to believe that the Respondent is affiliated with or authorized to deal for your Complainant, when, in fact, no such affiliation or authorization exists."

All of the foregoing evidence supports the trial court's finding of a likelihood of confusion. However, it is clear from his opinion that the district judge also predicted his finding of a likelihood of confusion on his own comparison of the respective names. Thus he stated that "the name 'Simmonds' as it has been used in the conduct of the Defendant's business is indistinguishable when spoken from 'Simmons.'"

It appears that in this class of case it is open to a trial judge, drawing on his own experience and observation, to make an informed judgment as to the likelihood of confusion apt to be spawned by strongly analogous symbols. Compare *Eastern Wine Corporation* v. *Winslow-Warren, Ltd.*, 137 F.2d 955 (2 Cir. 1943) with *LaTouraine Coffee Co.* v. *Lorraine Coffee Co., supra.* See Kaplan and Brown, Cases on Copyright, Unfair Competition, and Other Topics Bearing on the Protection of Literary, Musical, and Artistic Works, (1960 ed.), p. 492. Of course in this situation where the district court makes such a comparative appraisal to the extent that his conclusions are based "solely on the names themselves, we are in as good a position as the trial judge to determine the probability of confusion." *Eastern Wine Corporation* v. *Winslow-Warren, Ltd., supra,* at 960.

In the present case we have no hesitation in confirming the district court's conclusion. With the exception of the letter "d" occurring as its penultimate character, "Simmonds" is identical in spelling with Simmons. What was

said in *LaTouraine Coffee Co.* v. *Lorraine, supra,* is equally applicable here:

> ". . . Defendants have attempted to distinguish 'Lorraine' from 'LaTouraine' on the basis of the number of letters and syllables in the words, but this form of technical gymnastics is not determinative. (citations omitted) The initial letters and the last syllables—probably the parts of any word which impress themselves most firmly upon the memory—are identical . . ." Id. 117.

Even in the mouths of defendants' agents at the trial the two words came forth as phonetic twins. Perhaps on the tongues of linguists or precisionists, variations of articulation could be perceived. However, to the ear of the average person the two names would pass as one. Similarly, we believe that few but the discriminating of eye would, upon visual examination, readily perceive the subtle spelling gradation obtaining between the two names. In sum, on its face, we believe that the name Simmonds is inherently capable of generating confusing similarity with the name Simmons.

Finally, there is another aspect of this case which impinges on the question of infringement and its corollary—confusion. That factor relates to the good faith of the defendant Baker in electing to do business under the "Simmonds" name. If it can be shown that the selection of a name or symbol is part of a calculated or preconceived plan to play on the drawing power of a "congenial symbol" then this factor will assuredly enhance a plaintiff's position on the issue of likelihood of confusion. *LaTouraine Coffee Co.* v. *Lorraine Coffee Co., supra; Eastern Wine Corporation* v. *Winslow-Warren, Ltd., supra;* Restatement of Torts, § 729(b) and comment (f).

We believe that the present record amply sustains the trial court's finding that at the time Baker embraced the

"Simmonds" name he was aware that the symbol was likely to lead to confusion. Confusion, it might be added, which could only inure to his benefit.

Baker testified that he was aware of the Simmons name and its reputation at the time that the Simmonds name was selected. Inasmuch as Baker had been engaged in the retail furniture business for a number of years, any other reply would have been unworthy of belief.

As noted previously, in Baker's own testimony, at the time that he commenced his reupholstering operation, the Baker Furniture Store enjoyed a good name and reputation in the Lawrence, Massachusetts, area. Despite this fact, he eschewed the Baker name (and, if his testimony is to be credited, "Baker's" presumptive good will and customer allegiance) for the "Simmonds" designation upon expanding into the reupholstery field. No one in the Baker family or employ could lay claim to the "Simmonds" name and there was no discernible reason—apart from the reason supplied by this litigation—why the name "Simmonds" should have been selected.

Testifying at the trial on the selection of the name, Canner, Baker's right hand man in the early stages of the business, could only say:

> "Q. . . ., I ask you again, did you have any earlier discussions with Mr. Baker as to this name, the Simmonds Upholstering Company, for this business? A. You mean as to how we arrived at that name?
>
> "Q. Did you dicsuss it—this name with Mr. Baker? A. We discussed what name we might use.
>
> "Q. When did you discuss this? A. That was before we started up, or six months after, when I came to work for him.
>
> "Q. Did you discuss the name Simmonds Upholstering Company at that time? A. Well, yes, we discussed

several names. We thought we would use a name that would be a good name.

"Q. How did you arrive at the name Simmonds Upholstering Company? A. That was Mr. Baker's choice of a name."

Baker's nomination of "Simmonds" as his choice for a "good name"—a name without connection to himself or family—can thus be either be put down to a flight of imaginative fancy or to a calculatedly deliberate attempt to trade on a name well known in the market place We believe the record compels the acceptance of the latter.

We are confirmed in our belief that Baker acted in bad faith by his brazen attempt to establish rights in the Simmonds name extending back to 1899, the very year that plaintiff and its predecessors began to use the name Simmons, by means of a false and spurious bill of sale which Baker used to deceive the Boston Better Business Bureau and the Superior Court of Rhode Island.[4]

For all of the foregoing reasons we believe that the

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[4] Defendants have argued laches as an affirmative defense. The record showed that plaintiff did not become aware of the defendants existence until the summer of 1951. At that time plaintiff's attorneys sent notice of infringement to the defendants. Evincing concern that the defendants might have a legitimate claim to the name "Simmonds," plaintiff inquired of the defendants' counsel whether any one in the defendants' organization bore the name "Simmonds." This inquiry was ignored. Thereafter, the plaintiff proceeded to monitor the activities of the defendants. In 1952 plaintiff cooperated with a Federal Trade Commission investigation which led to a 1953 cease and desist order against Baker and his associates. Plaintiff successfully opposed defendants' application for registration of the name "Simmonds" as a service mark for reupholstering furniture in a patent office proceeding in 1957-58. The present suit was instituted on October 10, 1958.

It may well be true that plaintiff could have acted with more expedition in instituting the present suit but in view of defendants' calculated design to trade upon plaintiff's reputation and his reliance upon a fake document as to the origin of his company, we do not believe that he is in any position to invoke the defense of laches.

finding of the district court on the likelihood of confusion is amply supported by the record.

We turn then to defendants' contention that plaintiff's "Motel-Hotel Sign Program" violated the anti-trust laws of the United States—specifically Section 3 of the Clayton Act and Sections 1-3 of the Sherman Act. Defendants argue that if it can be demonstrated that plaintiff has violated the anti-trust laws, then under Section 33(b)(7) of the Lanham Act, 15 U.S.C. § 1115(b)(7), this violation will serve as an absolute defense to plaintiff's suit on its trademark.

The relevant facts bearing on defendants' contention may be briefly summarized as follows. Since 1954 plaintiff has had available for lease to qualified hotels and motels a sign bearing the legend "Sleep Best on Beautyrest by Simmons",[5] as well as roadside signs bearing the trademark "Beautyrest" together with the name of the motel. Since 1958 the wording on this sign has been changed to read "Ask for Beautyrest By Simmons."

Under the plaintiff's program the sign was leased or licensed to the motel owner for a fee of $15.00 (a loss figure to plaintiff), provided that the individual owner complied with certain conditions stipulated by plaintiff. The most critical condition of the program, as viewed by defendants, was the fact that the signs would only be leased to and displayed by motel owners who were fully equipped with plaintiff's "Beautyrest" mattresses. Thus, the owner who was already fully equipped with Beautyrest mattresses might immediately obtain the sign and participate in the program. An owner who was not so equipped could not obtain the sign until he changed to Beautyrest.[6] Moreover,

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[5] As noted above, this legend is covered by Registration No. 661,772 on file with the United States Patent Office.

[6] Since 1958, plaintiff has permitted motel owners who are not fully equipped with Beautyrest mattresses to display the sign provided

an owner who at one time had a full complement of Beautyrests and thus qualified for the program would have to return the sign and drop out of the program upon the use of a rival mattress in his establishment.

The record indicates that plaintiff annually circularizes the motel-hotel trade to alert it to the existence of its sign program and, in a further effort to promote the program, runs an advertisement in a national magazine inviting the traveling public to stop at motels displaying plaintiff's sign. The names of the participating establishments—those who have the signs and are thus equipped with Beautyrests—are contained in this ad.

The thrust of defendants' argument is that the plaintiff's sign program constitutes an illicit "tying" arrangement in which the sign constitutes the "tying" product and the Beautyrest mattress the "tied" product. Through this device, under defendants' view, the plaintiff has effectively blocked off and foreclosed a substantial segment of the mattress market from plaintiff's competitors.

Section 3 of the Clayton Act, 15 U.S.C. § 14, dealing with tying arrangements, provides as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale with the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the

(1) they agree to become 100% equipped with such mattresses within five years and (2) when applying for the lease order at least 20% of the number of such mattresses. The fact that during this transitional period a given hotel or motel might be only partially equipped with Beautyrests undoubtedly accounts for the change in the signs' message from "Sleep Best On Beautyrest By Simmons" to "Ask for Beautyrest By Simmons."

> United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. (Oct. 15, 1914, ch. 323, § 3, 38 Stat. 731.)"

Tying arrangements are condemned under Section 1-3 of the Sherman Act as "contracts in restraint of trade." While we must confess to having experienced some initial reluctance to accept defendants' contention that the plaintiff's sign program might, under any view, be considered a tying arrangement within the meaning of the antitrust statutes, reflection has persuaded us that strictly speaking the program might be said to fall within the literal language of the Act. Having thus concluded, defendants urge that the sign program should be struck down as "per se" illegal under the cited statutes as they have been construed by the Supreme Court.[7]

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[7] The concept of a "per se" violation in connection with tie-in contracts was articulated in *International Salt Co.* v. *United States*, 332 U.S. 392 (1947). In that case the International Salt Co. would only lease its patented salt-dispensing machines upon the condition that the lessees purchase all the salt that might be required for use in the machines from them. In affirming a summary judgment holding the contracts to be illegal under section 3 of the Clayton Act as well as section 1 of the Sherman Act, the Court stated that it was "unreasonable, *per se*, to foreclose competitors from any substantial market. . . . The volume of business affected by these contracts [a $500,000 annual volume] cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious." 332 U.S. at 396.

Thereafter the evidentiary distinctions between establishing a tie-in violation under the Clayton Act as distinguished from the Sherman Act were synthesized by the Court in *Times-Picayune* v. *U. S.*, 345

On the facts of the record we cannot accept defendants' position. Thus while we believe that the instant arrangement may well fit within the generic label of a "tying" device, we are not at all convinced that it is an improper one. As we stated in *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 292 F.2d 653, 655 (1 Cir. 1961), cert. den. 368 U.S. 931: "We may agree with the plaintiff that the compulsory joining of two 'separate' articles is a per se violation of the act. This statement, however, solves nothing." In that case, construing certain language in *International Salt Co.* v. *United States*, 332 U.S. 392 (1947), and relying on *United States* v. *Jerrold Electronics Corporation*, 187 F.Supp. 545 (D.C.E.D.Pa. 1960), aff'd Per Curiam, 365 U.S. 567 (1961), we held that business arrangements which conceptually could be styled "tie-ins" might be exculpated from the reach of the anti-trust laws if the arrangement was actuated by or could be explained on the basis of a

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U. S. 594 (1953) in the following terms: A tie-in arrangement will violate the Clayton Act "when the seller enjoys a monopolistic position in the market for the 'tying' product, or if a substantial volume of commerce in the 'tied' product is restrained;" and the practice will contravene the Sherman Act "whenever both conditions are met." 345 U.S. at 608-609. As thus formulated a more demanding burden of proof was required under the Sherman Act.

In *Northern Pacific Railway Co.* v. *U. S.*, 356 U. S. 1 (1958), the Court apparently reverted from the requirement of demonstrating the market dominance or "monopolistic" position of the defendant and substituted the less demanding test of a "sufficient economic power to impose an appreciable restraint on free competition in the tied product."

Thus in the instant case, before we might invoke any "per se" concepts, we would have to satisfy ourselves that the volume of commerce affected by the present arrangements should be regarded as substantial within the teaching of the above cited cases. The precise volume is a matter of dispute between the parties and the district court made no specific finding on this question. The case would have to be returned to the district court for a determination of this issue. Similarly we would have to rule that Simmons' 20% of the mattress market in the United States gave them a "sufficient economic power to impose an appreciable restraint on free competition in the tied product." In view of our disposition of the case, neither of these questions need be decided.

legitimate business justification as opposed to an improper motive, e.g., desire to increase market control through the economic leverage supplied by the tying arrangement.

We believe that in the instant case the motive actuating the requirement that an establishment displaying the Simmons sign possess all Simmons products is clearly within the exculpating principles outlined in *Dehydrating Process and Jerrold, supra.*

Focusing, for the moment, solely on the "tying product," we may start with the assumption that it was a desirable and legitimate aspiration of the Simmons Co. that its signs be hung on as many quality motels and hotels as possible. The signs served a *bona fide* advertising purpose and, presumably the greater the exposure accorded the Simmons name the more salutary would be the resultant impact on its business. Simmons could assuredly take active steps in the endeavor to foster this end.

Similarly when viewed from the aspect of the motel owner—at least those embracing the program—the Simmons sign was assuredly regarded as a genuine asset. Undoubtedly it was deemed a real, if subtle, inducement to the prospective tourist and a veiled assurance to those familiar with the Simmons name that a stop at the motel in question would insure a restful night's sleep. Again, to the owner thus disposed, it was an entirely legitimate aspiration that he obtain a Simmons sign.

Therefore, viewed *in vacuo,* plaintiff had the right to effect a widespread dissemination of its advertising and the individual owners undoubtedly had a coequal right to hang the signs. Defendants do not nor could they quarrel with these rights. It is only when the signs are "tied" to the mattresses that they dispute their validity.

However, if "tie" be the word, then we believe that plaintiff had an eminently legitimate interest to protect in "tying" or conditioning the use of the signs on the pur-

chase of its mattresses. There is no question that a legend appearing on a motel which invited the travelling public to "Sleep Best on a Beautyrest by Simmons" would be accepted at face value—as surely it is intended—that the motel features the Simmons mattresses on its beds. Quite obviously if the motel in fact did not have the Beautyrest mattress in its rooms but rather had an inferior brand, then the Simmons name, reputation and good will predictably might well suffer. In short, where the clear import of the sign program was to convey the message that a Beautyrest awaited the traveler inside, the Simmons Co. had ample justification in seeking to insure that the realization met this expectation. Simmons had a right, indeed a duty, to insure the truthfulness of its advertising and to exclude the possibility that a careless or capricious innkeeper might short-change his guests with a different mattress.

Thus we feel that while the instant arrangement might technically be deemed a tie-in, we do not believe that it is an illegal one nor one which presents the evils at which the anti-trust statutes were aimed.

Defendants also contend that one of the plaintiff's cooperative advertising plans was violative of Sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson Patman Act. It is defendants' contention that this program as carried out by Simmons conferred advertising advantages upon the larger retail outlets that were not available to smaller stores. Defendants' attack centers upon the adequacy of the notice concerning the program received by the smaller Simmons dealers. Upon careful consideration of the entire evidence bearing on this contention, we cannot say that the plaintiff indulged in any discrimiation in connection with its advertising program and thus we reject defendants' arguments on this point.

In view of our determination that Simmons has engaged in no violation of the anti-trust laws, it is unnecessary that we express any opinion on defendants' contention that an anti-trust violation, if proven, would serve as an absolute defense to a trademark action under the Lanham Act.

A judgment will be entered affirming the judgment of the district court and remanding the case to that court for the allowance of counsel fees.

United States Court of Appeals
For the First Circuit

No. 6137.

ABRAHAM (ABE) BAKER, INDIVIDUALLY, AND D/B/A SIMMONDS UPHOLSTERING COMPANY,
DEFENDANT, APPELLANT,

v.

SIMMONS COMPANY,
PLAINTIFF, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge,* and HARTIGAN and ALDRICH, *Circuit Judges.*

James M. Malloy, with whom *Ralph Warren Sullivan* and *Malloy, Sullivan & Sullivan* were on brief, for appellant.

Francis A. Even, with whom *William E. Anderson, James J. Schumann* and *Anderson, Luedeka, Fitch, Even & Tabin* were on brief, for appellee.

OPINION OF THE COURT.

December 26, 1963.

HARTIGAN, *Circuit Judge.* This is an appeal from a judgment of the United States District Court for the District of Massachusetts entered March 19, 1963, awarding plaintiff-appellee, Simmons Company, the amount of $1,094,779.94 damages and counsel fees in an action involving trade-mark infringement and unfair competition.

Defendant-appellant, Abraham Baker, individually and doing business as Simmonds Upholstering Company, was found guilty in the United States District Court for the

District of Massachusetts of trade-mark infringement in violation of the Lanham Act, 15 U.S.C. § 1114 (1958), and unfair competition.[1] The Simmons Company, a leading manufacturer of furniture possessing a "sleep feature," as well as a manufacturer of furniture for a variety of purposes and rooms, was found to be harmed by defendants' use of the name "Simmonds" in the conduct of their business of upholstering and reupholstering furniture when use of such trade-name was likely to cause, and had caused, confusion with the plaintiff among ordinary purchasers. An injunction was issued against the defendants and the plaintiff was held entitled to damages and attorneys' fees. *Simmons Company* v. *Baker*, 200 F. Supp. 149 (D. Mass. 1961).

After this court affirmed the aforementioned judgment, *Baker* v. *Simmons Company*, 307 F.2d 458 (1st Cir. 1962), the district court referred plaintiff's claim for damages to a Master "to hear the parties and their witnesses, and to report to the Court his findings and conclusions of law thereon on the question of damages."

The Master held five days of hearings during which time four witnesses testified concerning the activities and financial transactions of the defendants. On January 22, 1963 the Master filed his report. He found the defendants jointly liable to the plaintiff in the total sum of $475,473.47. The district court doubled the Master's figure—an act of judicial discretion provided for in § 1117 of the Lanham Act—and included $143,833.00 counsel fees and expenses. Judgment was entered for the plaintiff in the amount of $1,094,779.94.

The first four points raised by appellant can be quickly

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[1] Also defendants and found guilty were Simmonds Upholstering Co., Inc., and New England Upholstering Co., Inc., both of which were solely owned by Baker, and Simmonds Sales System, Inc., in which Baker held the controlling shares.

settled. (1) We find no merit in appellant's argument that the award of damages should have been barred by laches and the Massachusetts statute of limitations. On the question of laches we defer to our prior opinion, *Baker* v. *Simmons, supra* at 466 n. 4 where that issue was negated. Also in that opinion we found defendants had relied on a fake document in order to establish rights in the "Simmonds" name extending back to 1899 and had, in fact, succeeded in deceiving the Boston Better Business Bureau and the Superior Court of the State of Rhode Island. The Massachusetts statute sought to be invoked by appellant saves from its operation causes of action which are fraudulently concealed. Mass. G. L. Ch. 260 § 12.

(2) It is complained that the Master's disallowance of certain costs was improper. Here we are restrained by the principle that the findings of the Master are entitled to great weight and should not be disregarded unless clearly wrong. *Parker* v. *Interstate Trust & Banking Co.*, 56 F.2d 792 (5th Cir. 1932). We find sufficient evidence to sustain the Master's findings.

(3) Nor was it improper for the Master to award damages on the basis of gross sales of defendants. While some of the goods sold by defendants did not compete with those sold by plaintiff,[2] they were all sold under the name "Simmonds." A trade-mark infringer is liable as a trustee for profits accruing from its illegal acts even though the owner of the marks was not doing business in the consuming market where the infringement occurred." *Blue Bell Co.*

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[2] About forty percent of defendants' gross sales could be considered as limited to the reupholstering field. The district court found that whole defendant posed as a "reupholsterer," more than sixty percent of his gross sales was derived from the practice of "restyling" in the process of alleged "reupholstering." This "restyling," the district court found, was actually a subterfuge under which defendant Baker sold his customers new furniture under the representation that it was their old furniture "restyled." *Simmons Company* v. *Baker*, *supra* at 153.

v. *Frontier Refining Co.*, 213 F.2d 354, 363 (10th Cir. 1954) and cases cited therein. See also *Admiral Corporation* v. *Price Vacuum Stores*, 141 F. Supp. 796 (E.D.Pa. 1956).

(4) Finally, there is more than sufficient authority for the allowance of counsel fees in Lanham Act actions where the defendant is found guilty of fraud and palming-off. *Wolfe* v. *National Lead Company*, 272 F.2d 867 (9th Cir. 1959); *Keller Products* v. *Rubber Linings Corp.*, 213 F.2d 382 (7th Cir. 1954); *Admiral Corp.* v. *Penco, Inc.*, 203 F.2d 517 (2d Cir. 1953).

The fifth point raised by appellant contains more substance. The appellant contends that it was error for the Master to enlist *ex parte* the assistance of an independent accountant to furnish him with profit and loss statements for all the defendants.

In his report the Master recited, *inter alia*, that one Ames, "a public accountant," was called by defendants but that he discarded Ames' testimony "as not being of probative value." He further stated that the profit and loss statements introduced by the defendants and prepared by one Anderson, "a self-employed auditor," were "incomplete" and that he discarded them "as being not too reliable."

"[I]n their place I caused an outstanding and competent firm of certified public accountants to furnish me with profit and loss statements prepared from the ledgers of the defendants which were also placed in evidence. I am adopting these latter profit and loss statements as being most reliable." In a subsequent letter to the court, supplementing this report, the Master stated that he had employed "outside help" only after making "decisions as to which items in my mind, were disallowable. The accountants only, for my own purposes, diagnosed the figures which appeared in the books themselves, which were placed in evidence, and they only aided me in their proper allocations. I deem

this procedure to be on the same basis as if one were to go to a dictionary for a definition or to any reference book for guidance."

This is not a statement that the Master had already "made all the determinations as to allocations of expenses and deductions" as the lower court stated in approving the report but only that he had decided upon general items or categories, and that he used the accountant to interpret the books for the express purpose of making the dollar and cent allocations therein.

The Master's conclusion in his report that he found his accountant's profit and loss statements the most "reliable" ones seems a far cry from equating them with "a dictionary . . . definitions or . . . reference book."[3] Whatever "help" the accountant furnished, it went beyond this. We believe it apparent that the accountant served as an ordinary expert witness to interpret the books. Even if the books were clear, which quite evidently they were not, appellant now finds itself bound by whatever the accountant told the Master, without opportunity to cross-examine him either as to his qualifications, his methodology, and the extent of his examination of the books or of his understanding thereof, or as to his actual conclusions. It may be that a Master may himself call his own witness,[4] but that he should call him in camera, and without right of cross-examination is, to say the least, a most irregular act.

The Master's unquestioned right to disregard any evidence which he thinks is of doubtful probative value, *Aycrigg* v. *United States*, 136 F. Supp. 244 (N.D.Cal. 1954),

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[3] By the rule of ejusdem generis it is assumed reference book to mean a book like a dictionary, containing matters, essentially undisputed, as to which one could properly take judicial notice. *Cf.* 9 Wigmore, Evidence § 2484 (3d ed. 1940) "The trial judge . . . may consult any source of information or topics subject to *judicial notice*. . . ." (Ital. author's)

[4] But see 5 Moore's Federal Practice ¶ 53.06, at 2953 (2d ed. 1951).

does not enable him to substitute evidence of his own without following ordinary judicial procedures.

Judgment will be entered vacating the judgment of the district court and remanding the case for further proceedings not inconsistent with this opinion.

United States Court of Appeals
For the First Circuit

No. 6383.

ABRAHAM BAKER,
DEFENDANT, APPELLANT,
v.
SIMMONS COMPANY,
PLAINTIFF, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Maurice Schwartz for appellant.
William E. Anderson, with whom *Francis A. Even*, *James J. Schumann* and *Anderson, Luedeka, Fitch, Even & Tabin* were on brief, for appellee.

OPINION OF THE COURT.
April 2, 1965.

HARTIGAN, *Senior Circuit Judge* (by designation). This is an appeal from an order and judgment of the United States District Court for the District of Massachusetts entered June 8, 1964, overruling objections to a master's report and awarding appellee $1,094,779.94 in damages. Said master's report was submitted May 1, 1964, after further hearings were conducted in accordance with a judgment of this court entered December 26, 1963. *Baker* v. *Simmons Company*, 325 F.2d 580 (1st Cir. 1963). In an earlier opinion we affirmed the district court's issuance of

an injunction. *Baker* v. *Simmons Company,* 307 F.2d 458 (1st Cir. 1962).

After we remanded this case on December 26, 1963, the district court referred it to the master to permit the parties to examine the accountant previously used by the master in preparing his findings. Appellant now contends that the master, in his second report, merely rubber-stamped his first report and that in any event his report is not supported by the evidence. At the second hearing appellant was content only to cross-examine the accountant, introducing no witnesses of his own in rebuttal. The master was entitled to rely on the accountant's testimony and, therefore, to adhere to his earlier assessment of damages.

Appellant also contends that he was prejudiced by remarks made by the district judge, heard by the master, to the effect that appellant was a "crook" and that he desired to get into bankruptcy. He cites cases standing for the proposition that litigants are entitled to a trial before a tribunal free from bias and prejudice. That no doubt is true. However, the assessment of damages was made by the master and not by the district judge. The only question, therefore, is whether the district judge's remarks in any way infected the proceedings before the master. In the light of our first opinion, *Baker* v. *Simmons Company,* 307 F.2d 458 (1st Cir. 1962), we scarcely think the district judge's remarks could have had prejudicial effect on him. In addition, the record fails to indicate any bias or prejudice by the master himself. We, therefore, need not reach the question of whether the district judge's remarks in fact amounted to a showing of bias or prejudice.

The record does not convince us that the appellant was prejudiced either by the district judge or by the master in the scheduling of the hearings before the master. It would appear from the record and from the time elapsed since

our last decision that counsel for appellant had adequate time to prepare and to try his case.

We find no merit in the other contentions raised by appellant.

Judgment will be entered affirming the judgment of the district court.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 58-1014-S

SIMMONS COMPANY,
PLAINTIFF,
v.
ABRAHAM (ABE) BAKER,
as an individual and also
d/b/a SIMMONDS UPHOLSTERING CO., INC.
SIMMONDS SALES SYSTEM, INC.
and
NEW ENGLAND UPHOLSTERING CO., INC.
DEFENDANTS.

ORDER

The Court having considered the objections of the Defendant Baker to Second Report of Master, and the Motion of the Plaintiff to overrule those objections, to confirm the Second Report of Master, and to enter judgment thereon and in accordance with findings earlier made by the late Judge McCarthy, and having heard the arguments of counsel for the Plaintiff and counsel for the Defendant Baker,

IT IS HEREBY ORDERED that:

1. Each and everyone of Defendant Baker's objections to Second Report of Master be, and the same hereby is, overruled.

2. The Second Report of the Master, reaffirming his initial report after the further hearings ordered, is hereby confirmed, and the findings and conclusions of the Special Master in said initial and second reports are hereby adopted as the findings of fact and conclusions of law of this Court, with the further clarification that the liability of the Defendants is both joint and several.

3. The findings earlier made by the late Judge McCarthy in his Memorandum on Motions, dated March 19, 1963, viz.,

(a) that in addition to the sum found by the Special Master to be owing to the Plaintiff, the Plaintiff is entitled to the further sum of $475,473.47, and

(b) that the Plaintiff is entitled to recover counsel fees and expenses in the further sum of $143,833.00,

are hereby noted, and those further sums shall be allowed and included with the damages of $475,473.47 allowed by the Special Master.

4. The Plaintiff is therefore entitled to have judgment against the Defendants, jointly and severally, in the total amount of $1,094,779.94, with interest from the date of entry thereof, exclusive of taxable costs, and judgment shall be entered accordingly.

Enter:

(s) GEORGE C. SWEENEY
Chief Judge

June 8, 1964

JUDGMENT

In accordance with the Order of the Court of June 8, 1964.

IT IS HEREBY ORDERED:

Judgment is entered for the Plaintiff, SIMMONS COMPANY, in the above-entitled cause, against the Defendants jointly and severally, in the amount of $1,094,779,94, exclusive of taxable costs, together with interest thereon from the date of entry hereof.

By the Court:

(s) HELEN I. TWEEDY
Deputy Clerk

Filed
In Clerk's Office
Jun 8 4 52 PM '64
U.S. District Court
District of Mass.

June 8, 1964

ENTER:

(s) GEO C. SWEENEY
Chief Judge

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 58-1014-S
Unfair Competition
and
Trademark Infringement
Equitable Relief Sought

SIMMONS COMPANY,
Plaintiff,
vs.
ABRAHAM (ABE) BAKER
541 Haverhill Street
Lawrence, Massachusetts, as an
individual and also d/b/a
SIMMONDS UPHOLSTERING COMPANY,

SIMMONDS UPHOLSTERING CO. INC.,
1 Chase Street, Arcadia Mill
Methuen, Massachusetts

SIMMONDS SALES SYSTEM, INC.,
1 Chase Street, Arcadia Mill
Methuen, Massachusetts
and
NEW ENGLAND UPHOLSTERING CO. INC.
1 Chase Street, Arcadia Mill
Methuen, Massachusetts.
Defendants

INJUNCTION

November 16, 1961

After hearing upon the merits in the above-entitled action and because of the findings of trade-mark infringement and unfair competition by the defendants it is

ORDERED the defendants, their agents, servants, employees

and attorneys and all persons in active concert and participation with them be and they hereby are restrained and enjoined from using the name "Simmonds" and from using any other name or representation which would lead the public to believe that defendants are associated with the Plaintiff.

By the Court

November 16, 1961 (s) WALTER J. HURLEY
Enter: *Deputy Clerk*

(s) WILLIAM T. MCCARTHY
United States District Judge

Appendix C

CONFLICTING OPINION

ANCHOR SERUM COMPANY
v.
FEDERAL TRADE COMMISSION.
No. 11164.
United States Court of Appeals
Seventh Circuit.
Dec. 17, 1954.

L. M. McBride, Chicago, Ill., James T. Welch, Washington, D. C., for petitioner.

Robert B. Dawkins, Asst. Gen. Counsel, James E. Corkey, Atty., Earl W. Kintner, Gen. Counsel, Federal Trade Commission, Washington, D. C., for respondent.

Before DUFFY, Chief Judge, and MAJOR and SCHNACKENBERG, Circuit Judges.

MAJOR, Circuit Judge.

This is a petition by Anchor Serum Company, a corporation, to review and set aside a cease and desist order issued February 16, 1954, by the Federal Trade Commission (respondent), at the conclusion of proceedings on a complaint charging petitioner with violation of § 3 of the Clayton Act, 15 U.S.C.A. § 14. The order is directed not

only at the corporate petitioner which alone was made a party to the complaint, but also at its "officers, agents, representatives, and employees."

Petitioner was incorporated in 1917, and since that time has been engaged in the manufacture, distribution and sale of various animal health products, principally anti-hog cholera serum and hog cholera virus, with its principal place of business at St. Joseph, Missouri. Since the year 1936, it has been licensed to produce and sell its products by the Bureau of Animal Industry, United States Department of Agriculture, Petitioner sells its products to customers variously denominated as wholesalers, dealers and consumers, located throughout the various states of the United States.

There are thirty-two manufacturers who produce, sell and distribute serum and virus in the same trade areas as petitioner and who are in competition with petitioner for customers who resell or use said products. All such manufacturers are known in the trade as either "lay" or "vet" producers, such characterization being determined by and descriptive of the type of customer to whom they sell. "Vet" producers sell principally to veterinarians or to wholesalers who resell exclusively to veterinarians, and "lay" producers sell through other channels, such as drug stores, farm bureaus, wholesalers, etc. Of the thirty-two manufacturers of such products, twenty-three are "vet" and nine are "lay" producers. Petitioner falls within the latter category and is the largest producer of that group. While petitioner is in direct competition only with other "lay" producers, it is in competition with all producers in the sense that they all compete for the ultimate consumer market, viz., the farmer-hog owner.

At the time this case was heard by the Commission, petitioner had contracts with sixteen wholesalers for the sale of its serum, virus and other pharmaceuticals. Five of

such wholesalers are designated by petitioner as "ex-branch wholesalers," which are located in different states and do business under the name of "Anchor Serum Company." They are thus designated because they were all at one time owned by petitioner and sold to the manager of the branch under a contract which authorized the new ownership to use petitioner's name and good will. Seven of the sixteen wholesalers are designated as "Anchor wholesalers," each of which does business under the name of "Anchor Serum Company." While these wholesalers are and always have been independent of petitioner, they have by contract acquired the right to use the word "Anchor" in their business operations. The remaining wholesalers, four in number, are co-operatives, namely, Illinois Farm Bureau Serum Association, Iowa Farm Serum Company, Missouri Farmers Association, Inc., and Arkansas Farmers Association.

The first of the contracts in controversy was entered into with Anchor Serum Company of Indiana (one of the five ex-branch wholesalers) April 30, 1943, and provided in part as follows:

> "* * * and in further consideration of the use by the parties of the second part of the word 'Anchor' as a part of their name in any partnership or other form of business association, approved in writing by the party of the first part, the parties of the second part agree to purchase from the party of the first part, all their requirements of products manufactured and/or distributed by the party of the first part * * *."

In 1947, petitioner entered into contracts with the Illinois Farm Bureau Serum Association and the Iowa Farm Serum Company, each of which was the largest distributor of serum and virus in its state, which contracts obligated the purchasers "to buy, and does by these presents buy, and agrees to pay for all of its requirements of serum,

virus and other products at the prices and on terms specified herein."

We need not further relate the inhibiting provision contained in all of the contracts because what we have set forth is typical of the provision which each contains. Furthermore, petitioner concedes that all of the contracts contain "requirements" language which means that the contracting party is obligated by the contract to purchase from the petitioner all its requirements of the designated products.

Section 3 of the Clayton act, so far as here pertinent, makes it unlawful to "make a sale or contract for sale of goods, wares, merchandise, * * * on the condition, agreement, or understanding that the * * * purchaser thereof shall not use or deal in the goods, wares, merchandise, * * * of a competitor or competitors of the * * * seller, where the effect of such * * * sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Petitioner devotes much effort to what we think is an erroneous approach to the essential issue for decision, as is disclosed in its enumeration of the contested issues which are stated as follows:

> "1. Do the so-called requirements contracts of the Petitioner impose on any one or more of the sixteen customers who are parties to those contracts, illegal conditions of sale prohibited by Section 3 of the Clayton Act?
>
> "2. Even if it be determined that any one or more of those contracts impose illegal conditions of sale, does the record support the conclusion that the contracts in question have substantially lessened competition and tend to create a monopoly?"

Having thus stated the contested issues, petitioner in its brief presents its argument under two headings, (1) "No Contract Under Review Imposes An Illegal Condition On Any Of Petitioner's Customers," and (2) "Petitioner's Contracts Have Not Substantially Lessened Competition And Do Not Tend To Create A Monopoly."

[1] In Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356, 42 S.Ct. 360, 362, 66 L.Ed. 653, the court stated, with reference to the section of the Clayton Act now under consideration:

> "Section 3 condemns sales or agreements where the effect of such sale or contract of sale 'may' be to substantially lessen competition or tend to create monopoly. It thus deals with consequences to follow the making of the restrictive covenant limiting the right of the purchaser to deal in the goods of the seller only. But we do not think that the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition, or create an actual tendency to monopoly. That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial."

This statement squares with the plain, unambiguous language of the section and, so far as we are aware, has not been deviated from in any subsequent decision of the Supreme Court.

Thus, in our judgment, there was no legal issue before the Commission as to whether the contracts were illegal *per se;* the only legal issue before the Commission, as it is here, was whether the contracts with their restrictive provisions were calculated to have the proscribed effect or consequences.

[2, 3] By reason of petitioner's false approach, it becomes engulfed in numerous contentions which we think are beside the issue. For instance, in some detail it relates the legislative history of the Clayton Act, apparently for the purpose of demonstrating that it was not the intention of Congress to outlaw all so-called "requirements" contracts. The short answer to that argument is that Congress by the plain language which it used did not do so. Only contracts which had the proscribed effect were made unlawful. Furthermore, the plain language which Congress employed dispels all purpose in resorting to legislative history. Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356, 42 S.Ct. 360, 66 L.Ed. 653. There was evidence that some of the contracts, perhaps all, were entered into as a result of negotiations initiated by the purchasers rather than by petitioner. From this premise it is argued that the terms were not imposed by the petitioner and that as a result there was no illegality, even though the contracts had the proscribed effect on competition. The Commission rejected this argument and so do we. Certainly there is nothing in the language of the Act from which it can even be inferred that two classes of contracts were contemplated, depending upon whether the contract was initiated by the seller or the buyer. We think it is a novel theory that the rights, liabilities and obligations of parties to a contract depend upon which of the parties propose it. And we think it immaterial whether the contract was for the benefit of the seller or the buyer. In any event, the determining factor is whether the contract had the proscribed effect.

[4] As already noted, five of the contracting purchasers are designated as "ex-branch wholesalers," and seven are designated as "Anchor wholesalers." Those included in the former category were at one time owned by petitioner but sold to the contracting purchaser with the right to use petitioner's trade name, "Anchor." Those in the latter

category have likewise acquired by the terms of the contracts the right to use petitioner's trade name, "Anchor." Substantially the same argument is made as to all the purchasing wholesalers included in these two categories, the effect of which is that contracts with these purchasers were necessary in order to assure the proper use and protection of petitioner's trade name. It is asserted that each of them can do business with any competitor of petitioner simply by surrendering the privilege of using petitioner's trade name, and that for this reason the contracts contain no illegal condition. A short answer to the contention on this score is that § 3 makes no provision or exception for such contingencies. Like all other contracts, they are illegal if they have the proscribed effect. Petitioner's contention on this point, if adopted, would permit an easy avoidance of § 3. Nothing more would be required by the contracting parties, irrespective of the effect which their contract might have upon competition, than that there be included in the contract the right or privilege on the part of the purchaser to use the trade name of the seller.

As might be expected, the Commission places much reliance upon Standard Oil Co. of California and Standard Stations v. United States, 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371. Petitioner in its brief, consistent with its erroneous aproach to the real issue in the case, states, "* * * the Commission places great reliance in this case, presumably on the theory that the Court held the exclusive dealing contracts of Standard to be illegal *per se*." The Commission here makes no such contention and the Supreme Court in the Standard Oil Company case created no basis for such a theory. Moreover, the opinion in Standard Oil is of no benefit to petitioner, notwithstanding its profession to the contrary. It is true that the court on pages 306-308 of 337 U.S., on pages 1058-1059 of 69 S.Ct. of its opinion discusses "requirements" contracts in connection

with the Act here involved in a manner which might prove deceptive in the absence of a careful analysis of the entire opinion in connection with the result reached. The court, in contrasting the character of contracts here involved with "tying" agreements or devices, stated, 337 U.S. at page 306, 69 S.Ct. at page 1058:

> "Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public. In the case of the buyer, they may assure supply, afford protection against rises in price, enable long-term planning on the basis of known costs, and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand. From the seller's point of view, requirements contracts may make possible the substantial reduction of selling expenses, give protection against price fluctuations, and—of particular advantage to a newcomer to the field to whom it is important to know what capital expenditures are justified—offer the possibility of a predictable market."

It will be noted that the court was discussing the economic advantages which might be inherent in such contracts and then proceeded, following the quoted language, to enumerate a number of factors which might be relevant in determining such advantages from the economic standpoint. The court, however, as we understand the opinion, brushed aside these so-called economic advantages because of their irrelevancy under the plain language of § 3. Following the enumeration of the economic advantages, the court stated, 337 U.S. at page 308, 69 S.Ct. at page 1059, "Yet serious difficulties would attend the attempt to apply these tests." The court, in denying the contention that there must be proof that competition has actually been

impaired, stated, 337 U.S. at page 311, 69 S.Ct. at page 1060:

> "We are dealing here with a particular form of agreement specified by § 3 and not with different arrangements, by way of integration or otherwise, that may tend to lessen competition. To interpret that section as requiring proof that competition has actually diminished would make its very explicitness a means of conferring immunity upon the practices which it singles out. Congress has authoritatively determined that those practices are detrimental where their effect may be to lessen competition."

The court made reference to the legislative history of the Act, 337 U.S. at page 312, 69 S.Ct. at page 1061, and pointed out that the qualifying clause, " 'where the effect * * * "may" be to substantially lessen competition or tend to create a monopoly' ", was added only after the House and Senate bills reached Conference. On the following page, referring to the economic investigation which appellants in that case urged, the court stated, 337 U.S. at page 313, 69 S.Ct. at page 1062:

> "To insist upon such an investigation would be to stultify the force of Congress' declaration that requirements contracts are to be prohibited wherever their effect 'may be' to substantially lessen competition."

The crucial language upon which the court's decision was predicated is as follows, 337 U.S. at page 314, 69 S.Ct. at page 1062:

> "We conclude, therefore, that the qualifying clause of § 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected. It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patron-

> age, and it is clear that the affected proportion of retail sales of petroleum products is substantial. * * * Standard's use of the contracts creates just such a potential clog on competition as it was the purpose of § 3 to remove wherever, were it to become actual, it would impede a substantial amount of competitive activity."

Thus, this pronouncement reduced to its simple form is that it is not necessary to show the actual impact which a "requirements" contract has on competition, but that it is sufficient if it possesses the potentiality to impede a substantial amount of competitive activity.

Petitioner attempts to bolster its erroneous interpretation of the Standard Oil case by relying upon a subsequent decision of the Supreme Court in Federal Trade Commission v. Motion Picture Advertising Service Co., Inc., 344 U.S. 392, 73 S.Ct. 361, 97 L.Ed. 426. This reliance is also of no benefit to petitioner. In the latter case the court had before it a proceeding instituted under § 5 of the Federal Trade Commission Act, 15 U.S. C.A. § 45. The court distinguished, 344 U.S. at page 397, 73 S.Ct. at page 364, the charge then before the court from a proceeding such as is here involved, that is, a proceeding under § 3 of the Clayton Act. The court did not even mention its previous decision in the Standard Oil case.

[5] Having rejected the false premise upon which petitioner seeks to review and set aside the order of the Commission, as shown by its statement of the contested issues as well as its erroneous interpretation of the Supreme Court decision in the Standard Oil case, there appears to be little if anything left to decide. Certainly there is no occasion to enter into a detailed discussion of the findings made by the Commission or the evidence relied upon in support thereof. That the findings are amply supported is hardly open to question. The Commission found not

only that the contracts involved furnished a vehicle for the potential impediment to a substantial amount of competitive activity but that they had actually done so. Specific instances are shown and found where the market for serum and virus was substantially foreclosed to producers other than petitioner by reason of the latter's "requirements" contracts.

Petitioner complains that the chief targets of the Commission's attack are the co-operatives, and particularly the Illinois Farm Bureau Serum Association and the Iowa Farm Serum Company. If such be the case, it is reasonable to think that it is because these two wholesalers are the most vulnerable to attack because of the large volume of business which they do, due to their system of distribution and the fact that they sell in the two largest hog producing states. The Iowa organization, for instance, has 137 dealer-members, located throughout the state's 99 counties, and the Illinois organization has 90 dealers, located throughout the various counties of Illinois.

The Commission found, in dollar volume, the amount of business which petitioner did with each of its sixteen contract holders for the years 1949, 1950 and 1951. Without reciting these figures, it is sufficient to note that the volume of business was substantial, and particularly is this so with reference to its two largest wholesale dealers, Illinois Farm Bureau Serum Association and Iowa Farm Serum Company, to each of which its sales during these three years amounted to around one-half million dollars per year. The findings clearly reveal the effect of petitioner's exclusive contracts with the two of its wholesale dealers just mentioned. For instance, Lederle Laboratories, a competitor of petitioner, sold to the Iowa Company serum and virus as follows: 1945, $56,757.57; 1946, $65,211.16; 1947, $17,943.14. The same competitor sold serum and virus to the Illinois Association as follows: 1945, $172,114.08; 1946,

$169,338.69; 1947, $125,903.10. After the year 1947, this competitor made no sales to either the Iowa Company or the Illinois Association. 1947 was the year in which both the Iowa Company and the Illinois Association entered into their exclusive agreements with petitioner. It is evident that this competitor was completely stymied in its effort to do business with these two contract holders, and the inescapable inference is it was because the latter were under obligation to make all their purchases from petitioner. A similar fate was met by the Diamond Serum Company, another competitor of petitioner, as disclosed by the findings.

It would require a naive mind to conclude, as petitioner would have us do, that the agreements under consideration could result in other than an adverse effect upon competition. Suppose, for instance, that a salesman for any of petitioner's competitors should attempt to sell to or to obtain an order for sale from any of petitioner's contract holders. Such an attempt would be barren of results because of the customer's obligation to petitioner, and this would be true even though the salesman offered a superior product on more favorable terms. It thus appears plain that the products handled by petitioner's exclusive contract holders are removed from the competitive area.

[6] We are not unsympathetic to the suggestion that the section under consideration is capable of producing harsh results, and it is more than possible that the situation before us is a fair example. If such be the case, however, it is the legislative and not the judicial branch of the government from which relief should be sought.

[7] Petitioner also raises the issue that the order under review is improperly directed against its "officers, representatives, and employees." Petitioner in support of its contention on this issue cites a decision of this court, R. J. Reynolds Tobacco Co. v. Federal Trade Commission, 7 Cir.,

192 F.2d 535. On the contrary, the Commission relies upon Regal Knitwear Co. v. National Labor Relations Board, 324 U.S. 9, 65 S.Ct. 478, 89 L.Ed. 661. The order in the Reynolds case was issued pursuant to the Federal Trade Commission Act, which was distinguished from the order of the Labor Board before the court in the Regal Knitwear case, on the ground that the order in the former case was wider in scope than that in the latter because "the unnamed 'officers, agents, representatives and employees' are not only subject to a contempt proceeding for the violation of a court's enforcement decree where equitable considerations prevail, but they are likewise subject to a severe penalty, to be recovered in a civil action." 192 F.2d at page 540. The distinction which we made in the Reynolds case, however, cannot be made here because the enforcement of this order is lodged exclusively in the appropriate Court of Appeals by § 11 of the Clayton Act, 15 U.S.C.A. § 21. It is, therefore, our view that the Regal Knitwear case is controlling here.

The petition to set aside respondent's cease and desist order is denied, and an appropriate enforcement decree will be entered upon presentation.

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In the
Supreme Court of the United States

OCTOBER TERM, 1964

No. 1[redacted]194

ABRAHAM BAKER,
PETITIONER,

v.

SIMMONS COMPANY,
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANCIS A. EVEN
WILLIAM E. ANDERSON
JAMES J. SCHUMANN
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135 S. La Salle Street
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Attorneys for Respondent.

La Salle Street Press—Chicago 60610

This brief adopts the notations of the petition for references to the record appendices to the parties' briefs in the three prior appeals, abbreviating as follows:

No. 5962:
- 5962 I p. ...: "Vol I Record Appendix to Brief for Appellants"
- 5962 II p. ...: "Vol II Record Appendix to Brief for Appellants"
- 5962 III p. ...: "Vol I Record Appendix to Brief for Appellee"
- 5962 IV p. ...: "Vol II Record Appendix to Brief for Appellee"

No. 6137:
- 6137 p. ...: "Combined Volume, Record appendices of Appellant and Appellee"

No. 6383:
- 6383 I p. ...: "Record Appendix to Brief for Appellant"
- 6383 II p. ...: "Record Appendix to Brief for Appellee"

Other abbreviations:

PX.....: plaintiff's exhibit

DX.....: defendant's exhibit

INDEX

	PAGE
Foreword	1
Citation To Opinions Below	2
Comment on Jurisdiction	2
Additional Statement of Fact	3
The Parties	3
Lower Courts' Consideration Of The Questions Presented	5
Reasons for Denying Certiorari	7
Conclusion	14
Appendix:	
Complaint	15
Answer to Complaint	27
Motion To Amend Defendants Answer	35
Motion To Amend Answer	36
Motion For Summary Judgment	39
Defendants' Motion To Amend Answer	40
Motion For Reconsideration Of Defendant's Motion For Summary Judgment	42
Memorandum On Motion (September 14, 1960)	44
Memorandum On Motion (September 19, 1960)	46
Findings Of Fact And Conclusions Of Law	47
Injunction	59

PAGE

CASES CITED

Bruces Juices v. *American Can Co.*, 330 U.S. 743 (1946) 9

Craven v. *United States*, 22 F. 2d 605 (1 Cir., 1927) .. 13

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International Salt Co. v. *United States*, 332 U.S. 392 (1947) 6

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Roberts v. *Cooper*, 20 How. 467 (1857) 2

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PAGE

STATUTES CITED

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(b)(7) 5, 8, 10, 11

28 U.S.C. § 1254(1) 2
1292(a)(1) 2
1332(a) 11
1338(b) 11
2101(c) 2

MISCELLANEOUS

Congressional Record, Vol. 92 (1946) 10

Webster's Second International Dictionary, p. 629 13

In the
Supreme Court of the United States

OCTOBER TERM, 1964

No. 1221

ABRAHAM BAKER,
PETITIONER,

v.

SIMMONS COMPANY,
RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Foreword

Viewed even favorably to the Petitioner, this petition, if granted, would present the interesting ultimate question whether an alleged anti-trust violation that two courts have already said was not proved should give Abraham Baker license to use the name "Simmonds"

which was never his,

which he used in order to associate himself with Respondent,

which he pleaded falsely that he had derived from one whose name it was, and whose use of it antedated the Respondent's use of "Simmons" in their related businesses, and

which he sought to establish by the same false testimony, his own, and forged bill of sale that had earlier procured for him an injunction from the Superior Court of Rhode Island against another's use of "Simmons".

Citation To Opinions Below

The similarly-entitled section of the petition merely alludes to the record (5962, I, p. 599) and to 200 F. Supp. 149 (D. Mass., 1961) for the Findings of Fact and Conclusions of Law of the District Court. We have, accordingly, reproduced them as an appendix to this brief, preceded by the pleadings, including the motion for summary judgment upon which the District Court first considered the matter raised here by the Petitioner (5962, I, p. 29) and the District Court's disposition of that motion and of the Defendant's motion for reconsideration of the denial of the Defendant's motion for summary judgment (5962, III, pp. 735-739).

Comment on Jurisdiction

The "reach-back" jurisdiction of this Court, i.e., to reopen the basic question of liability decided by the Court of Appeals for the First Circuit in 1962 in Case No. 5962, is said to be based upon *Hamilton-Brown Shoe Co.* v. *Wolf Brothers,* 240 U.S. 251, 257-258 (1915) and *Toledo Scale Company* v. *Computing Scale Co.,* 261 U.S. 399, 418. It is at least questionable that those early decisions should continue to control the appellate machinery now set forth in 28 U.S.C. 1292(a)(1), 1254(1), and 2101(c). The mandatory language of 28 U.S.C. 2101(c) would appear to be basis for denying the petition on the ground that the Petitioner, having elected to exercise the prerogative of interlocutory appeal from the injunction, (28 U.S.C. 1292(a)(1)) and having failed to petition this Court from the affirmance of his liability in the appeal that disposed of the questions he seeks to review by this petition, is estopped by the decision of the Court of Appeals in Case No. 5962 as "the law of the case," *Roberts* v. *Cooper,* 20 How. 467, 481 (1857). However, the Respondent does not press the point because there is more substantial reason why certiorari should be denied.

Additional Statement of Fact

The Parties

Simmons Company is a Delaware corporation, organized in 1915. When organized, it succeeded to the business of The Simmons Manufacturing Company which was a Wisconsin corporation organized in 1884 under the name "Northwestern Wire Mattress Co.", and which had become, by change of name in 1899, "The Simmons Manufacturing Company". (Finding No. 2; 5962 I p. 599; Appendix, p. 47) Respondent is probably best known to the general public for its BEAUTYREST mattress and its HIDE-A-BED sofa, although it manufactures a wider range of furniture products. These have included, since the early 1930's, upholstered furniture for the living room, at first to accompany Simmons' upholstered dual-purpose furniture, and later as an independent line of upholstered furniture.

The Petitioner, Abraham Baker, was a retail furniture merchant in Lawrence, Massachusetts, starting about 1935. In about 1943, he began a re-upholstering venture, which he called "Simmonds Upholstering Company", as a side-door operation of "Baker Furniture Company", his retail establishment. The tail quickly wagged the dog and Simmonds Upholstering Company prospered (Finding 17, Appendix, p. 51). Baker Furniture Company disappeared.

The sordid details of *how* this venture prospered are set forth in Findings 16, 17, and 30 to 32 inclusive. The equally sordid details of how Petitioner sought to justify his adoption of the name "Simmonds" by a forged document and false testimony is detailed in Findings 24 to 29 inclusive, in Findings Nos. 35 and 36, and, as well, in Conclusions of Law Nos. 5 and 6. The findings of "likelihood of confusion" and actual confusion, and wilfull infringement, are Findings 21 to 23. These findings were entered on No-

vember 15, 1961, and the injunction to which the Court found the Respondent entitled in Conclusion 10 was entered on the following day, November 16, 1961.

The District Court's characterization of Mr. Baker as a "crook", (the third question presented by the petition) was made on March 23, 1964, some two and one-half years and two appeals later, and there is no suggestion that that conclusion was not drawn from the evidence in the case.

There were *four* defendants in the District Court. In addition to Mr. Baker personally, there were (a) Simmonds Upholstering Co., Inc., a Massachusetts corporation, the advertising, sales, and purchasing arm of the business, (b) New England Manufacturing Co., Inc., a Massachusetts corporation, the manufacturing arm of the business, and (c) Simmonds Sales System Inc., also a Massachusetts corporation, through which Mr. Baker sought to extend his business methods, by way of franchise of the name "Simmonds Upholstering Company", to other parts of the United States, viz., New York, New Jersey, Pennsylvania and Michigan. The latter was defunct, although suable under Massachusetts law, when the complaint (Appendix, pp. 15-26) initiating this action was filed on October 10, 1958.

Mr. Baker owned all of the stock of Simmonds Upholstering Co. Inc. and New England Upholstering Co. Inc., except for a few qualifying shares in each case held by members of his family (Finding 5, Appendix, p. 48). Those corporations were adjudicated bankrupt about a month after the Court of Appeals' mandate of August 8, 1962, affirming liability, in Appeal No. 5962. *In the matter of Simmonds Upholstering Co. Inc.,* In Bankruptcy No. 580-62 (D. Mass.); *In the Matter of New England Upholstering Co.,* In Bankruptcy No. 657-62 (D. Mass.).

Lower Courts' Consideration of the Questions Presented

The matter which the Petitioner seeks to raise in this Court was considered in the District Court at least three times. The first was on the defendants' motion for summary judgment (5962, I, p. 29, Appendix p. 39), briefed and argued before the District Court, and denied in the District Court's Memorandum of September 14, 1960 (5962, III, pp. 737-739, Appendix p. 44). This first disposition was promptly followed with a concession by the defendant, for the sake of argument, that the facts were as the plaintiff had contended on all issues, whereupon the District Court denied the motion for summary judgment as a matter of law, in the Memorandum of September 19, 1960 (5962, III, pp. 735-739; Appendix pp. 42-46). Then after a trial of fifty (50) days, during which the defendants tendered their evidence on the issue Petitioner seeks here to raise (only one of two alleged antitrust "defenses"), the Trial Court concluded that the defendants had failed to prove any violation of the antitrust laws (5962, I, p. 610, Conclusion 8, Appendix p. 58).

The legal question whether the antitrust law violation here charged could have been an absolute defense under Section 33(b)(7) of the Lanham Act, 15 U.S.C. § 1115(b)(7) was only decided in the District Court, if it was truly decided there at all, by the District Court's allowance of an amendment to the answer to set up the alleged antitrust violation as a defense (5962, I, pp. 26-29; Appendix p. 40). This was done largely on the strength of dictum in *Forstman Woolen Co.* v. *Murray Sices Corporation,* 10 F.R.D. 367 (S.D. N.Y., 1950) and this Court's reference, in *Timken Roller Bearing Co.* v. *U. S.,* 341 U.S. 593, 598 (1951) that Section 33(b)(7) of the Lanham Act "penalizes" use of a trademark to violate the anti-trust laws.

The question was again argued to the District Court on the motion for summary judgment but not decided because

the Court concluded instead that there were disputed issues of facts as to all defenses. Finally, when the defendants conceded the facts, the motion was denied as a matter of law, although the brief memorandum on the motion for reconsideration is not clear as to which legal issue was decided, i.e., whether the Court decided as a matter of law that there was no antitrust violation on the assumed facts, or that, even if there were a violation, it could not as a matter of law be the absolute defense for which the Petitioner had contended (5962, III, pp. 735-739).

The Conclusions of Law filed at the end of a trial are more informative in that they establish (Conclusion No. 8) that the defendants failed to carry their burden of proving an antitrust violation.

The Court of Appeals in its opinion (307 F. 2d 458, 468) likewise concluded that the facts did not amount to an antitrust violation because

> "We believe that in the instant case the motive actuating the requirement that an establishment displaying the Simmons sign possess all Simmons products is clearly within the exculpating principles outlined in *Dehydrating Process* and *Jerrold*, supra."

Even in so stating, the Court was less discriminating than the record, which had established that the "tying product", if that be the word, was the sign which read "Sleep Best On Beautyrest By Simmons", and the "tied product", if such it was, was not just *any* Simmons' mattress (there are many), but its premiere "BEAUTYREST".

The Court finally concluded that there was no basis for accepting the "per se" allegation advanced by the defendants (who had sought to classify the trademark registration as a Federally granted "monopoly", like the patent and copyright, in order to invoke the "per se" rule of *Inter-*

national Salt Co. v. *United States,* 332 U.S. 392 (1947) and *U. S.* v. *Paramount Pictures,* 334 U.S. 131, (1948)). It did, however, say, in its consideration of *Northern Pacific Railroad* vs. *United States,* 356 U.S. 1 (1958), that were it necessary to consider the apparently relaxed standard announced in *Northern Pacific,* it would have been necessary to return the case to the District Court for specific findings that the

> ". . . volume of commerce affected by the present arrangements should be regarded as substantial within the teaching of the above cited cases. * * * Similarly we would have to rule that Simmons' 20% of the mattress market in the United States gave them a sufficient economic power to impose an appreciable restraint on free competition in the tied product". (Footnote, p. 468)

The next-to-concluding paragraph of the opinion reads (p. 469):

> "In view of our determination that Simmons has engaged in no violation of the antitrust laws, it is unnecessary that we express any opinion on defendants' contention that an antitrust violation, if proven, would serve as an absolute defense to a trademark action under the Lanham Act."

Reasons for Denying Certiorari

1. Questions Nos. 1 and 2 of the petition are interdependent. Actually, a resolution of the alleged conflict between the First and Seventh Circuits is only the first step of three which would be necessary to reverse the judgment below. Neither the District Court nor the Court of Appeals got beyond the first step because each of them held, in the Respondent's favor, that there had been no violation of the antitrust laws.

The second step in invoking the Lanham Act as a "defense", if the language of Section 33 (b)(7) of the Lanham Act means anything, is to find that the mark in suit had been used "to violate the antitrust laws." The mark sued upon was "Simmons", Registrations Nos. 137,699, 532,319 and 548,280 (5962, IV, pp. 799-804). The alleged "tying product" was a slogan, separately registered as a certification mark, Registration No. 661,772 which read "Sleep Best On Beautyrest By Simmons" and was incorporated into a medallion certification sign (5962, II, p. 769) leased to the motel for display on its premises. The alleged "tied product" was not just any Simmons mattress, but rather the BEAUTYREST mattress. Thus, there is a further fact question which would have to be determined, viz., whether the mark "Simmons", covered by Registrations Nos. 137,699, 532,319 and 548,280, was used "to violate the antitrust laws", or whether, if there be violation, the mark so used was "Sleep Best On Beautyrest By Simmons".

The third step which would then require decision would be whether, if "Simmons" rather than "Sleep Best On Beautyrest By Simmons" were the instrumentality of the asserted violation, it should be a *complete defense* to this action, in contradiction of the very language of Section 33(b)(7) of the Lanham Act, which states that the penalty to be suffered is loss of an evidentiary advantage, viz., loss of a conclusive presumption of exclusive right to the mark arising out of the state of "incontestability" derived from five years of continuous use. Stated another way, the question is whether Respondent, who did not rely upon either the conclusive presumption of Section 33(b)(7), nor the *prima facie* presumption of Section 33 (a), but proved its superior right with evidence, should be penalized beyond what the statute prescribes and, in effect, stripped of its trademark in apparent contradiction of the "doctrine that

where a statute creates a new offense and denounces the penalty . . ., the punishment . . . can only be that which the statute prescribes." *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U.S. 165, 174-175 (1915); *Bruces Juices* v. *American Can Co.*, 330 U.S. 743, 755 (1946).

As a corollary to this third step, it would be necessary that this Court also decide that Abraham Baker, who, so far as the record established, was neither mattress-maker nor mattress-seller, nor an operator of motels, nor, therefore, in a position to be injured by asserted malefactions of the Respondent which were alleged but not proved, should be *entitled* to invoke the antitrust laws.

Analogy to the patent misuse doctrine is not availing because a trademark right is not, like the patent or copyright, a "monopoly" or a right *in gross*, but rather a right appurtenant to a going business. "It does not confer a right to prohibit the use of the word or words. It is not a copyright. . . . A trademark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his." *Prestonettes* v. *Coty*, 264 U.S. 359, 368 (1923). "The owner of a trademark may not, like the proprietor of a patented invention, make a negative and merely prohibitive use of it as a monopoly. . . . In truth, a trademark confers no monopoly whatever in a proper sense, . . ." *United Drug Co.* v. *Rectanus*, 248 U.S. 90, 97-98 (1918). The public interest in the careful circumscription of even legal monopolies does not attach itself to trademarks as such, the public interest in trademarks being identifiable, if not concurrent, with that of the trademark owner, i.e., that the goods sold under the mark be those of the owner of the mark.

Since an antitrust violation, if proved, could not have harmed the Petitioner, there seems very little reason to create him a "very strange class of private attorneys gen-

eral" (*Kelly* v. *Kosuga,* 358 U. S. 516, 520 (1958)), on his own behalf, to preserve, and to enable him to resume, the way of business life detailed in the findings of the District Court referred to in the foregoing "Additional Statement of Fact."

2. As a further reason for denying certiorari, it is pointed out that multiple causes of action were pleaded and proved, viz., trademark infringement under the common law, unfair competition under the common law, and lastly, the infringement in commerce of the trademark rights protected by plaintiff's Federal registrations. (See Complaint, paragraphs 6 & 20, Appendix pp. 16, 24; Finding No. 1 and Conclusions of Law No. 4; 5962 I pp. 599, 610).

Section 33(b)(7) of the Lanham Act does not, by its terms, purport to touch the Respondent's common law rights in its name "Simmons" as a common law trademark, and it does not, by its terms, purport to attach itself to Respondent's right to be free of unlawful and unfair competition in the use of its trade name "Simmons", an infringement which the District Court found was as effective as it was deliberate and calculated.

Nor did the Act's sponsor, Congressman Lanham, see Section 33(b)(7) in that light (92 Congressional Record 7524; 1946):

> "One of the valuable new rights created by the Act is the incontestable right after five year's use of the mark and the corollary thereto that the certificate of registration is conclusive evidence of ownership and the right to the exclusive use of the mark. *This new and valuable right is denied to any trademark registrant who is shown to have used his mark to violate the antitrust laws, but this provision does not, and is not intended to deprive the registrant of any rights he would possess or enjoy if this Act were not enacted into law.* Stated in other terms, proof of violation of the antitrust laws

> of the United States by a registrant in the use of his mark does not under this Act destroy the validity of or the right of the registrant to continue to use the mark, but it places on him a burden of proof in the event of litigation which others do not have to carry, by diluting the weight the Court is to give to his certificate of registration as evidence of ownership and the right to use the mark. This is the intent and effect and the only intent and effect of the seven sub-paragraphs of paragraph b of Section 33." (Italics supplied)

Thus, even if all of the preliminary questions outlined in the preceding section of this argument should be decided favorably to Mr. Baker, and should amount, as he contends, to a "complete defense"* to the federal cause under the Lanham Act, there is no apparent basis upon which this Court could recognize Section 33(b)(7) of the Lanham Act as a defense to Respondent's rights in its own name under the common law. This Court has heretofore avoided making unavailing decisions involving the federal one of multiple grounds each capable of supporting the judgment (*Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935)):

> ". . . the case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment."

It should not matter that the non-federal, common law causes were decided by a federal court under its diversity and pendant jurisdictions under 28 U.S.C. 1332(a) and 1338(b).

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* Indeed, if Congress had intended that use of a trademark "to violate the antitrust laws" were to be an absolute defense to an infringement action brought under the Lanham Act, it would have been simple enough to have chosen more direct language for the purpose instead of setting it up merely as a proviso to the granting of an evidentiary advantage.

3. The last question presented by the petition is the invocation of this Court's supervisory power over the lower courts "to correct a wrong caused by the intemperate, prejudiced and unfounded attack on a litigant by the District Judge.", who ". . . termed petitioner a 'crook', seeking bankruptcy, who has admitted committing perjury before me and before the Registration Office in Washington***. The petitioner has not sought bankruptcy and the record is barren of any evidence that he admitted committing perjury before Judge McCarthy or before anyone else." (Petition, page 9).

The key word in the foregoing is "admitted". We must agree with the Petitioner's counsel that the Petitioner never "admitted" committing perjury. But the District Court did find (Findings 24 and 35, and Conclusion 5) that Baker had indeed testified in Superior Court of Rhode Island that he had bought his business from one "William B. Simmonds" and that he took a "bill of sale" (PX 37, 5962, IV 764) from the said "William B. Simmonds" to evidence the transaction. On the strength of this asserted longevity, the Superior Court of Rhode Island, at Mr. Baker's instance, enjoined one Abraham Adler from using the name "Simmons" (the pot calling the skillet black) (PX90, 5962, II 641-647).

He swore to that transaction in the Patent Office, too (Interrogatories 5962, IV, p. 813; Answers 5962, IV, p. 793).

He pleaded it in this lawsuit (Answer, paragraphs 19 and 32, Appendix pp. 31, 35), and in his deposition herein, he testified in detail about his transaction with "William B. Simmonds" (5962, I pp. 103, 104, 110, 111; III, pp. 140-145).

Respondent subsequently proved that "William B. Simmonds" was a non-existent person, his "Simmonds Upholstering Company" a non-existent enterprise, and that the "bill of sale" by which Mr. Baker "bought" it, was a "fake document" procured by Mr. Baker (307 F. 2d 458, 466; Footnote 4).

Webster's Second International Dictionary, p. 629, defines "crook" in a manner which suits these circumstances very well.

The utterance by the District Court was made on March 23, 1964, from his hospital bed* over the telephone (6383 I, p. 35-37) in the course of his ruling upon a motion of the petitioner's counsel to censure the Master for allegedly condoning a contempt by excusing a witness from the accounting hearing for one hour (6383 II, pp. 39-44; I, pp. 26-37).

One may wonder whether it is ever appropriate for a District Judge to speak of a litigant as a "crook" when it was not necessary to call a spade a spade. However, the statement was made two-and-one-half years after the liability determination which detailed the defendant's activities, and, no doubt, reflected the District Judge's ire at Baker's attempt to deceive the Court with spurious evidence. See Conclusion No. 5:

> "5. Defendants' fraudulently prepared Bill of Sale, which purported to give them a right to use the name 'Simmonds', was intended to be used, and was actually used by them as a means not only to deceive this Court, but also had been used successfully to deceiving another Court to believe that the Defendants had in fact succeeded to a pre-existing 'Simmonds Upholstering Company' and had lawful claim to the name. * * *"

Bias or prejudice such as to disqualify a judge or his official act must be personal in nature as distinguished from "a judicial predilection obtained from the hearing of a case." *Gallarelli* v. *United States*, 260 F. 2d 259, 261 (1 Cir., 1958) In terms most applicable to this case, the proposition was perhaps best stated in another First Circuit case some forty years ago, *Craven* v. *United States*, 22 F. 2d 605, 607-608 (1 Cir., 1927):

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* The District Judge died on April 6, 1964. The Master ultimately filed his report which was in due course confirmed by the Chief Judge of the District Court, who entered the judgment for the Respondent since affirmed by the Court of Appeals in Case No. 6383.

"At most, then, the affidavit charges a 'bias and prejudice', grounded on the evidence produced in open court at the first trial, and on nothing else. We hold that such bias and prejudice (if these be appropriate terms for a well-grounded state of mind, 255 U.S. 42, 41 S.Ct. 236, 65 L.Ed. 481) is not personal; that it is judicial. 'Personal' is in contrast with judicial; it characterizes an attitude of extra-judicial origin, derived non coram judice. 'Personal' characterizes clearly the prejudgment guarded against. It is the significant word of the statute. *It is the duty of a real judge to acquire views from evidence. The statute never contemplated crippling our courts by disqualifying a judge solely on the basis of a bias (or state of mind,* 255 U.S. 42, 41 S.Ct. 236, 65 L.Ed. 481) *against wrongdoers, civil or criminal, acquired from evidence presented in the course of judicial proceedings before him.* Any other construction would make the statute an intolerable obstruction to the efficient conduct of judicial proceedings, now none too speedy or effective." (Emphasis supplied)

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be denied.

Respectfully submitted,

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June 25, 1965

APPENDIX

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 58-1014-S
Unfair Competition
and
Trademark Infringement
Equitable Relief Sought

SIMMONS COMPANY,
Plaintiff
vs.
ABRAHAM (ABE) BAKER
541 Haverhill Street
Lawrence, Massachusetts, as an
individual and also d/b/a
SIMMONDS UPHOLSTERING COMPANY,

SIMMONDS UPHOLSTERING CO. INC.,
1 Chase Street, Arcadia Mill
Methuen, Massachusetts

SIMMONDS SALES SYSTEM, INC.,
1 Chase Street, Arcadia Mill
Methuen, Masachusetts
and
NEW ENGLAND UPHOLSTERING CO. INC.
1 Chase Street, Arcadia Mill
Methuen, Massachusetts,
Defendants

COMPLAINT

The Parties

1. Simmons Company, Plaintiff, is a corporation of the State of Delaware.

2. Defendant Abraham (Abe) Baker, whose correct legal

name is at present unknown to Plaintiff, is a citizen of the Commonwealth of Massachusetts.

3. Defendant Simmonds Upholstering Co., Inc., is a corporation of the Commonwealth of Massachusetts, and has its principal place of business at Methuen, Massachusetts.

4. Defendant Simmonds Sales System Inc., is a corporation of the Commonwealth of Massachusetts, and has its principal place of business at Methuen, Massachusetts.

5. Defendant New England Upholstering Co. is a corporation of the Commonwealth of Massachusetts, and has its principal place of business at Methuen, Massachusetts.

Jurisdiction

6. As to subject matter, as more fully appears hereinafter, Plaintiff seeks relief from unfair competition and trademark infringement by the Defendants. This Court has jurisdiction because:

(a) The matter involves infringement of rights granted to Plaintiff by the laws of the United States in respect of a trademark registered under said laws (28 U.S.C. 1338a);

(b) Defendants' unfair competition is related to Plaintiff's claim under the trademark laws of the United States (28 U.S.C. 1338b);

(c) Diversity of citizenship exists between Plaintiff and each of the Defendants, and the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs (28 U.S.C. 1338a, as amended by Act of July 25, 1958, Public Law 85-554, 72 Stat. 415).

7. As to venue, Plaintiff alleges that each of the Defendants resides in the District of Massachusetts.

Statement of Claim

8. (a) Plaintiff (which term as used hereinafter includes Simmons Company and its predecessors) was founded as a manufacturing concern at Kenosha, Wisconsin, in the

year 1870 by Zalmon G. Simmons. It was then a proprietary enterprise known as "Z. G. Simmons & Company". In 1876, Plaintiff commenced the manufacture of furniture with the introduction of a woven wire mattress, and thereafter conducted that portion of the business under the name "Northwestern Wire Mattress Company". In 1884, said Z. G. Simmons and others formed Northwestern Wire Mattress Company, a corporation of Wisconsin, which succeeded to the business of Z. G. Simmons personally under that name. In 1899, the Wisconsin corporation became, by change of name, "The Simmons Manufacturing Company". The present Plaintiff, Simmons Company, a Delaware corporation, was formed in 1915 and promptly acquired all of the business assets of The Simmons Manufacturing Company (Wisconsin).

(b) In the eighty-eight years of its existence, initially as a proprietorship, and subsequently as a corporation, Plaintiff has been controlled and managed by its founder, said Z. G. Simmons, and by succeeding generations of his family. Upon the death of Z. G. Simmons in 1910, his son Zalmon G. Simmons, Jr., became President of The Simmons Manufacturing Company, and then President of the present Plaintiff, Simmons Company, from 1915 until 1932. Grant G. Simmons, son of Zalmon G. Simmons, Jr., was President of Simmons Company from 1932 until 1957. Since 1957, Grant G. Simmons, Jr. has been, and now is President.

(c) Continuously since 1899, when the name of the business became "The Simmons Manufacturing Company", Plaintiff has used, and it is now using, the word "SIMMONS", the surname of the founder, as a trademark on substantially all of the merchandise which Plaintiff has manufactured and sold, or otherwise as a trade name, to identify merchandise sold by Plaintiff.

9. From its entry into the furniture manufacturing business in 1876, the range of furniture products manufactured

and sold by Plaintiff has expanded greatly and now includes bed springs, bedsteads, mattresses, daybeds, studio couches, cabinet beds, in-a-door beds, various kinds of beds convertible to other items of furniture, such as daybeds, lounges, sofa beds and the like; hospital beds and other institutional furniture including chairs, cabinets, drawers, chests, wardrobes, etc.; upholstered furniture of various types for various uses; and wood and metal furniture of many kinds.

10. From its beginning at Kenosha, Wisconsin, in 1870, Plaintiff developed a world-wide business in the sale of furniture, and related products under the name "SIMMONS". By 1910, Plaintiff had distribution centers in Chicago, New York City, Baltimore, St. Louis, St. Paul and San Francisco. By 1915, a coast-to-coast warehouse system had been established reaching most of the principal market areas of the United States, and was expanding. By 1920, Plaintiff had acquired additional manufacturing facilities in San Francisco, California, Atlanta, Georgia, and Newark, New Jersey, and has established a manufacturing plant and business, under the name "Simmons Ltd." in Canada. By 1930 Compania Simmons, S. A. (Mexico) had been formed by Plaintiff and was making and selling SIMMONS products in Mexico, and Simco Ltd., had been formed and was making and selling SIMMONS products in Great Britain. By 1940, manufacturing plants had been established by Plaintiff in Cuba, Puerto Rico and Argentina for making SIMMONS products.

11. Plaintiff's business now includes furniture and bedding manufacturing plants in various parts of the United States, namely: Atlanta, Georgia; Columbus, Ohio; Dallas, Texas; Elizabeth, New Jersey; Jacksonville, Florida; Kansas City, Kansas; Kenosha, Wisconsin; LaGrange, Illinois; Los Angeles, California; Medford, Massachusetts; Munster, Indiana; San Francisco, California; and Union,

New Jersey; and distribution centers at many other cities. Plaintiff's products are sold under the name SIMMONS in department and furniture stores throughout the United States, and in many foreign countries, including Canada, Mexico, Cuba, Venezuela, Argentina, and other Western Hemisphere countries, Great Britain, and other European countries; and Australia.

12. From the year 1917 to date, Plaintiff has advertised its products in periodicals of national circulation and of local circulation, including all of the New England States, and has expended many millions of dollars in so advertising its products under the name or trademark SIMMONS. As a result of said advertising and of the extensive use of said trademark on the merchandise manufactured and sold by Plaintiff, and of the high quality of the products on which said trademark has been used, the public throughout the United States, including all of the New England States, are well acquainted with Plaintiff's name, and have come to look upon merchandise advertised for sale under said trademark as merchandise of high quality, and as emanating from Plaintiff.

13. Plaintiff is the owner of the following United States trademark registrations, the trademark "SIMMONS" registered thereby, and the good will and business appurtenant thereto:

Registration No. 137,669, dated Nov. 30, 1920,
Renewed Nov. 30, 1940
Registration No. 532,319, dated Oct. 24, 1950
Registration No. 548,280, dated Sept. 18, 1951

14. By reason of the premises, Plaintiff has established the word "SIMMONS" as an asset of inestimable value in its business of manufacturing and selling furniture, and since adopting and commencing the use of the name or trademark SIMMONS, has been, and still is, the exclusive owner of said name or trademark as applied to merchandise

of the same general character as those to which Plaintiff has applied said name or trademark. Said exclusive ownership has been generally recognized in the trade and by dealers in furniture, and has been established in controversies against persons or concerns who used said name or trademark or simulations thereof on related merchandise without the consent of Plaintiff, and who, after protest or suit by Plaintiff, discontinued such use.

15. Plaintiff is informed and believes, and therefore alleges that:

(a) Before any of the unfair acts hereinafter set forth in Sub-Paragraphs b, c, d, e, and f, Defendant Baker knew that Plaintiff had spent large sums of money in developing, promoting and selling products under the name or mark SIMMONS, but nevertheless, with intent to unfairly compete with Plaintiff, Defendant Baker unfairly commenced the business of re-upholstering furniture under the names "Simmonds Upholstering Company" and "Simmonds Upholstering Company of New England" in the Commonwealth of Massachusetts and elsewhere in the United States, and has carried on and expanded said business while representing falsely to the public in the New England States, and elsewhere, that said business is a part, or affiliated with, the Plaintiff.

(b) By 1950, Defendant Baker, then operating as "Simmonds Upholstering Co.", had established sales branches in a number of the principal New England cities, including, to wit, Boston, Hartford, Lawrence, Lowell, Manchester, New Haven, Portland and Providence. To handle the expanding volume of business solicited by him under the name of "Simmonds Upholstering Co.", Defendant Baker formed the Defendant corporation "New England Upholstering Co.", all of the capital stock of which, with the exception of a few qualifying shares has been, and now is, owned by Defendant Baker, who controls the operation of said De-

fendant corporation. Defendant New England Uholstering Co., in a plant at Lawrence, Massachusetts, re-upholsters furniture for Defendant Baker, and for the other defendants, and has substantially no other accounts. Furniture re-upholstered by Defendant New England Upholstering Co., for the account of Defendant Baker and said other defendants, is labeled by it with the name "Simmonds", and returned by it or by them to the customers of Defendant Baker and said other defendants in the aforementioned New England cities and other places.

(c) In 1950, Defendant Baker formed Defendant corporation Simmonds Upholstering Co., Inc., and owned substantially all of the capital stock thereof. He is President of said corporation, the other offices of which are held respectively by his wife and his brother. Defendant Simmonds Upholstering Co., Inc., succeeded to the upholstering business formerly conducted by Defendant Baker personally under the name Simmonds Upholstering Co.

(d) In 1950, Defendant Baker, together with one Edward Williams and one Sidney Rubin, formed Defendant Simmonds Sales System, Inc., in which Defendant Baker holds the controlling interest. Said Defendant Simmonds Sales System, Inc., was organized for the purpose of selling re-upholstering service for the accounts of Defendant Simmonds Upholstering Co. Inc., and Defendant Baker, and to carry the operation of all of said Defendants throughout and beyond the New England area through a system of franchises or licenses, the details of which are at present unknown to Plaintiff, but which have served to extend the name "Simmons Upholstering Co." and its unfair operations beyond the New England States, viz., at various times, to New York City, Philadelphia, Pittsburgh, Detroit and Montreal, Canada.

(e) Said Defendant Baker, together with said individuals Sidney Rubin and Edward Williams, officers of the

Defendant Simmonds Sales System, Inc., in 1951 organized a corporation, Simmonds Upholstering Co. Inc., under the laws of the State of New York to extend to the State of New York the operations conducted in the New England area by said Defendants Baker, Simmonds Upholstering Co. (Mass.) and Simmonds Sales System, Inc. Said New York corporation granted franchises to various individuals who operate in and around the City of New York under the trade styles "Simmonds Upholstering Co. of Manhattan", "Simmonds Upholstering Co. of Brooklyn", and others at present unknown to Plaintiff.

(f) Said Defendant Baker promoted the formation of a corporation of Canada under the name Simmonds Upholstering Co. Ltd., with headquarters at Montreal, and Plaintiff is informed and believes that Defendant Baker owns a controlling interest in said Canadian corporation.

16. The business operations of said Defendant Baker, and said corporate defendants controlled by said Defendant Baker, and of the various business organizations licensed or franchised by him or them to operate under the name SIMMONDS, have created and fostered great confusion in the public mind between Plaintiff's name and the name SIMMONDS. The names SIMMONS and SIMMONDS are virtually identical, visually and phonetically, and the several defendants and their several licensees, by direct misrepresentation in the personal and word-of-mouth solicitation of business, and by innuendo in their newspaper, radio and television advertising, and by the labeling of the furniture re-upholstered by them, have sought to create, and have created, the impression in the minds of certain segments of the public that they are in fact a department of Plaintiff, or are affiliated with Plaintiff. As a result of said fraudulent misrepresentations of Defendants and their licensees, and as a result of their shoddy and unscrupulous treatment of their cus-

tomers, Plaintiff's good will and reputation with the purchasing public have suffered far in excess of $10,000.

17. For example, and without fully describing the character of misrepresentations made by Defendants and their licensees to fraudulently associate themselves with Plaintiff, their salesmen have on occasion stated to prospective customers that they are "a department of the Simmons Bedding Company". On other occasions, said salesmen, responding to inquiries from prospective customers as to whether they represented Plaintiff, replied evasively and in accordance with instructions from said Defendants, in order to confirm in their customers' minds the alleged association with Plaintiff suggested initially by Defendants' fraudulent use of the name "SIMMONDS". Defendants' advertising in media of local and interstate circulation, viz., newspapers, radio and television proclaims them "America's Oldest and Largest Upholsterer, in business since 1899". (Plaintiff is in fact one of the country's largest furniture manufacturers, and, as stated in said Registration No. 532,319 first used the name "SIMMONS" as a trademark in 1899). The re-upholstering service furnished by Defendants is supplied under the name "SIMMONDS", and is sold in commerce between the several New England states and elsewhere.

18. The business tactics of said Defendants Baker, Simmonds Upholstering Co., Inc. (Mass.), and Simmonds Sales System, Inc., insofar as their relations with general public are concerned, resulted in proceedings against them by the Federal Trade Commission and the entry in 1953, by consent, of a Cease and Desist Order against their fraudulent advertising of price, quality of materials, workmanship, and guarantee, and against their representation that "Simmonds Upholstering Co." was "America's oldest and largest re-upholsterer of furniture", or "was established

in 1899", which representations were admitted by said Defendant Baker, in said consent order, to be untrue.

19. Notwithstanding the foregoing, said Simmonds Upholstering Co., by its President, the said Defendant Abe Baker, filed an application in the United States Patent Office on or about June 6, 1956 for registration of the name SIMMONDS as a mark for the service of upholstering, reupholstering, restyling, recovering, repairing, and refinishing furniture, and said Defendant Baker, as President of Defendant Simmonds Upholstering Co., Inc. (Mass.), made oath that said name had been in use since 1899. Plaintiff opposed the granting of said registration, and, when Plaintiff had proceeded to present evidence of its superior and prior right in the name of SIMMONS in the bedding and furniture business, and to support its charge of fraud on the part of said Defendants Simmonds Upholstering Co., Inc. and Abe Baker, said Defendant Simmonds Upholstering Co., Inc., by its President Abe Baker, voluntarily confessed judgment in favor of Plaintiff by abandoning its application for registration.

20. Notwithstanding the Order of the Federal Trade Commission, and notwithstanding the confession of judgment in favor of Plaintiff in the trademark proceeding in the United States Patent Office, Defendants Abe Baker and Simmonds Upholstering Co., Inc., (Mass.) have continued the unfair and fraudulent misrepresentations and business practices hereinbefore complained of, which violate Plaintiff's rights in respect to said name or trademark SIMMONS under the common law and under said Federal trademark registrations, and which were enjoined by the Federal Trade Commission, and Plaintiff believes that said Defendants will continue said unfair, deceptive, fraudulent and misleading practices to Plaintiff's injury, unless enjoined by this Court.

DEMAND FOR JUDGMENT

22. WHEREFORE, Plaintiff prays:

A. That this Court order, adjudge, and declare:

1. That Plaintiff has the exclusive right to use the word "Simmons" (including any simulations thereof) as a trade name or trademark in connection with the manufacture, sale or repair of furniture;

2. That the Defendants and each of them have infringed upon the rights of Plaintiff by using the words Simmonds as a trade name or trademark in connection with the sale or the upholstering or re-upholstering of furniture;

3. That the United States Registrations Nos. 137,699, 532,319 and 548,280 are valid, and that Plaintiff is the exclusive owner thereof, and of all rights pertaining thereto;

4. That the Defendants, and each of them, have infringed upon the rights of Plaintiff in respect of said registrations.

B. That said Defendants, and each of them, their officers, agents, employees and attorneys, and all acting under or through them, be perpetually enjoined from:

1. making any further use of the word SIMMONDS, or any other name or mark confusingly similar to Plaintiff's name or trademark SIMMONS in connection with the business of selling, upholstering or re-upholstering, or otherwise servicing furniture;

2. representing in any way that said Defendants, or any of them, are part of, affiliated with, or in any way have the approval of the Plaintiff.

C. That said Defendants, and each of them, be ordered and directed:

1. to remove the name SIMMONDS from their

business and corporate names and from the names of any corporation or concern owned or controlled by them or any of them, and from any official registry in the Commonwealth of Massachusetts, or elsewhere where said names may appear;

2. to terminate forthwith all licenses or franchises granted by them and purporting to convey a right to use the name "Simmonds".

D. An accounting for profits and damages;

E. Reasonable attorney's fees;

F. The cost of this action; and

G. Such further or additional relief as the Court may deem just.

SIMMONS COMPANY,
Plaintiff
By (s) DONALD R. ANDERSON
Hill, Barlow, Goodale
& Adams
53 State Street
Boston, Massachusetts
Attorneys for Plaintiff

October 10, 1958
Boston, Massachusetts

Of Counsel:
(s) C. A. SOANS
(s) WM. E. ANDERSON
(s) FRANCIS A. EVEN
Soans, Anderson, Luedeka
& Fitch
135 S. LaSalle Street
Chicago 3, Illinois

Sept. 25, 1958
Chicago 3, Illinois

ANSWER TO COMPLAINT

Now comes the Defendant in the above entitled case and collectively answer the compaint in the above entitled action as follows:

1. The allegations of paragraph 1 of the complaint are admitted.

2. The allegation of paragraph 2 is admitted.

3. The allegation of paragraph 3 of the compaint is admitted.

4. The allegations of paragraph 4 of the complaint is denied. To the Defendant's best knowledge, Simmonds Sales System Inc. does not have a place of business in Methuen. Simmonds Sales System Inc. is a defunct organization, in fact and in law, and have been a defunct organization for many years.

5. The allegations of paragraph 5 are admitted.

6. The allegations of paragraph 6 are admitted only with respect to jurisdiction. Insofar as they imply any rights in the Plaintiff for infringement or unfair competition by the Defendants, they are denied.

7. The allegations in paragraph 7 are admitted.

8. Defendants have no present knowledge of the allegations of paragraph 8(a), (b) and (c) and therefore accordingly deny the same and hold the Plaintiff strictly to its proof.

9. Defendants do not have present knowledge of the allegations of paragraph 9 and accordingly deny the same and hold the Plaintiff strictly to its proof. It is specifically denied however, that the list of goods set forth in paragraph 9 of the complaint have been manufactured by the Plaintiff from 1876 and that all of these items have been made since a time prior to the founding of the Defendants respective businesses.

10. Defendants do not have present knowledge of the

allegations of paragraph 10 and therefore deny such allegations, and hold the Plaintiff strictly to its proof.

11. Defendants do not have present knowledge of the allegations of paragraph 11 of the complaint and therefore deny such allegations and hold the Plaintiff strictly to its proof. If Plaintiff does sell products under the name Simmons, such sales take place only in department and furniture stores in a manner which is completely distinctive of and not subject to the liklihood of confusion with the Defendant's operations which do not involve the selling of products. Defendants do not and have never sold furniture and or bedding.

12. The allegations of paragraph 12 are at present unknown to the Defendants and accordingly, they are denied. Plaintiff is held strictly to its proof in its allegations of this paragraph.

13. Defendants admit the issuance of registrations set forth in paragraph 13 of the complaint, but have no knowledge as to whether or not Plaintiff is the present owner of the registrations at this time, and accordingly hold the Plaintiff strictly to its proof in this allegation.

14. Defendant denies the allegations in paragraph 14.

15. (a)Defendant denies the allegations of paragraph 15(a) of the complaint.

(b) Defendants deny the allegations of paragraph 15(b) except as hereinafter specifically admitted.

Defendant Baker did at one time do business as Simmonds Upholstering Co., having sales branches in several cities.

Defendant Baker, however, no longer and has for a long time not done business as an individual. Simmonds Upholstering Co., as a proprietorship is a defunct organization. Simmonds Upholstering Co., Inc. and New England Upholstering Co., Inc. are distinct and separate corporations in which Defendant Baker has stock interests. Sim-

monds Upholstering Co., Inc. has enjoyed a substantial expanding volume of business. Defendant New England Upholstering Co., Inc. does not reupholster furniture for defendant Baker. New England Upholstering Co., Inc. reupholsters furniture for Simmonds Upholstering Co., Inc. and other corporations. Defendants deny they use the names Simmonds on labels as a trademark associated with goods.

(c) The allegations of paragraph 15 (c) are admitted, except insofar as they imply that Defendant Baker alone formed Defendant corporation Simmonds Upholstering Co., Inc.

(d) The allegations of paragraph 15 (d) are specifically denied except as hereinafter specifically admitted.

Defendant Baker, Edward Williams and Sidney Rubin in or about 1950 did form defendant Simmonds Sales System Inc.

Defendant Baker did not have a controlling interest.

Simmonds Sales System Inc. did not operate in Canada.

Simmonds Sales System Inc. had franchise agreements with individual manufacturers to provide reupholstering services on a local scale in various areas. The franchise arrangements of Simmonds Sales System Inc. was thereafter discontinued and all franchise operations ceased. The Simmonds Sales System Inc. then became a defunct corporation.

(e) The allegations of paragraph 15 (e) are specifically denied except as hereafter specifically admitted. A corporation, Simmonds Upholstering Co., Inc. was organized under the laws of the State of New York and had franchise agreements with various individuals operating in the New York area. This corporation is presently defunct and franchise agreements no longer are in operation.

(f) Defendants admit the existence of a corporation of Canada under the name Simmons Upholstering Co. Ltd.,

but specifically deny that Defendant Baker owns the controlling interest in said Canadian corporation and specifically deny any relevance of the said Simmonds Upholstering Co., Ltd. with matters otherwise pleaded by the Plaintiff.

16. Defendant denies the allegations of paragraph 16. More specifically and not by way of limitation of the general denial of paragraphs 16, the Defendants deny any implication that they sell products or goods in the nature of furniture bearing a label marked Simmonds. Defendants deny that the work performed in the course of services rendered is shoddy and that the treatment of their customers is unscrupulous. Defendants, and in particular, Simmonds Upholstering Co., Inc. are on excellent terms with their customers and have enjoyed a substantial portion of the business being in repeat business with former satisfied customers.

17. Defendants deny the allegations of paragraph 17 in the Plaintiffs complaint, except insofar as it is admitted that Defendants Simmonds Upholstering Co., Inc. renders a reupholstering service in commerce under the name Simmonds Upholstering Co., Inc.

18. Defendants deny the allegations of paragraph 18 except as hereinafter specifically admitted and stated.

Defendant Simmonds Upholstering Co., Inc. (Mass.) was not involved in any proceeding with the Federal Trade Commission. It is admitted that an order was entered by consent with the Federal Trade Commission that certain actions should not be taken by Simmonds Sales System Inc. and Defendant Baker. However, Defendants did not admit and still do not admit any malfeasance, misfeasance and or nonfeasance on their part, which resulted either in the entry of the order or the origination of the proceedings by the Federal Trade Commission. A consent order was agreed upon as a matter of convenience, since the parties therein

involved were, in fact, acting properly and not in a manner which varied from the proposed order by any material degree. That since the provisions of the order were in accordance with good business practice, the parties therein involved were desirous of acting in accordance with such order whether or not it was entered, and accordingly, the entry of such an order was not considered to adversely affect or change the operation of the parties therein involved.

19. The allegations of paragraph 19 are denied except as specifically herein admitted. Defendant Simmonds Upholstering Co., Inc. filed an application in the United States Patent Office on or about June 6, 1956 for registration of the service mark Simmonds for service of reupholstering, restyling, recovering, repairing and refinishing furniture. The said Defendant Baker as president, made an oath that the name had been in use since 1899, which in fact it had, by the Defendant Simmonds Upholstering Co., Inc.'s predecessor in business, notwithstanding any agreements or understandings or orders involving the Federal Trade Commission. The Plaintiff did oppose the granting of the registration. The Defendant Simmonds Upholstering Co., Inc., only as a matter of expediency, voluntarily agreed to abandon the application. It is specifically denied the Plaintiff has any prior or superior rights in the name Simmons in the bedding and furniture business which preempts the Defendant's rights to the mark Simmonds for the aforementioned services. Moreover, Defendants specifically deny any fraud malfeasance, nonfeasance and misfeasance on their behalf in connection with their activities. The application for registration of the service mark "Simmonds" was made in good faith, with the knowledge and belief that the Defendants Simmonds Upholstering Co., Inc. had acquired a valid unassailable and superior right in the mark Simmonds for the services therein claimed, and that the mark "Simmonds" had acquired a significance when used

in conjunction with the Defendant's corporate name Simmonds Upholstering Co., Inc. and that Defendant Simmonds Upholstering Co., Inc. was merely trying to consolidate the rights which it long previously acquired, with such rights having been previously by implication and positive action of the Plaintiff long been recognized.

20. The plaintiffs allegations in paragraph 20 of the complaint are denied by the defendants.

Further and affirmatively answering the defendants state:

21. Abe Baker does not now and has not for a long time in the past, done business as Simmonds Upholstering Company, nor does Abe Baker in any way engage in the re-upholstering or upholstering business as an individual. Defendant Baker's sole interest in connection with the named Defendant's is as an officer and stockholder.

22. Simmonds Sales System, Inc. and Simmonds Upholstering Company are defunct in operation and have been for a long time in the past. New England Upholstering Co., Inc. does not and has not used the word "Simmonds" as a trade mark or service mark.

23. Defendants deny that the word "Simmonds" which the Plaintiff claims as a trademark has become and/or has remained distinctive of the Plaintiff's goods; that the mark is primarily merely a surname in common usage and incapable of acquiring trademark significance.

24. Defendants deny that the use by them individually or collectively, of the word "Simmonds" either alone or in combination with the words "Upholstering Co., Inc." as a corporate name when applied to the aforementioned services is likely to cause confusion and mistake in the minds of the public and to deceive purchases as to the source of origin thereof. To the contrary, defendants believe and therefor aver that the cumulative dissimiliarities of both the mark or word, the manner of their use, and the goods of the Plaintiff and the services of the Defendants are suf-

ficient to avoid likelihood of confusion or confusion. The Defendants neither sell nor manufacture goods such as claimed by the Plaintiff as goods that it manufactures. The words "Simmonds Upholstering Co., Inc." used by the Defendants do not resemble the Plaintiffs claimed and alleged trademark "Simmons" when applied to the services of the Defendants, to be likely to cause confusion or mistake as to the source of origin.

25. The word "Simmons" or variations thereof has been so widely used in connection with various goods and services by others that the Plaintiff cannot now claim an exclusive or an all encompassing right to the word, and/or, alternately cannot extend his claim of right to the word "Simmons" if there is such a right, so broadly as to encompass the operation of the Defendants under the name Simmonds or Simmonds Upholstering Co., Inc. and the Plaintiff is consequently strictly limited in its rights in the mark "Simmons" to the specific furniture which the Plaintiff has in the past manufactured, and not to services such as rendered by the Defendants under the name Simmonds or Simmonds Upholstering Co., Inc.

26. Defendants believe and therefore aver the Plaintiff cannot rightfully contend that it is entitled to preempt the trade of reupholstering and upholstering services with respect to marks having "Simmonds" as a portion thereof and thus exclude others including the Defendants from the use of such marks. Defendants believe that this is especially true in these proceedings since the alleged mark of the Plaintiffs, "Simmons" cannot be described as an original, fanciful, unusual, arbitrary or strong mark as it merely signifies a surname.

27. As a complete defense, the Plaintiff is estopped to brink these proceedings by reason of the fact that it became fully aware of the activities of the Defendants and their predecessors or associated companies and their use

of the word "Simmonds" at least as early as 1950 but nonetheless, had never taken any steps to have such use enjoined or otherwise prevent confusion which the Plantiff alleges is caused by such use of the word "Simmonds" by the Defendants. Such inaction amounts to laches creating an estoppel.

28. As a complete defense the Plaintiff is estopped to bring these proceedings by reason of the fact that the Plaintiff in bad faith, enticed and induced the Defendant to substantially expand their operation and business, and allowed the Defendants to expend many hundreds of thousands of doflars in advertising and in the policing of its name Simmonds Upholstering Co., Inc. until the Defendants had built up a substantial good will at least in the local area of New England in a manner amounting to aquiescence creating an estoppel.

29. Defendants deny that the Plaintiff has ever used the words "Simmons" as a service mark and that with respect to the use of the mark "Simmons" as a trademark the Plaintiff has long since abandoned such mark for the Plaintiff no longer uses the mark "Simmons" in a trademark sense, but merely as a company name. The Defendants further allege that the Plaintiff no longer uses the mark "Simmons" as such but in conjunction in various ways with other words, as for example, the word "BEAUTYREST", and that therefore, the Plaintiff's mark is no longer "Simmons", but "BEAUTYREST" by "Simmons" or "Simmons Beautyrest" or some similar arrangement.

30. The Defendants further allege that they had not used the mark "Simmons" except in conjunction with and always associated with the words "Simmonds Upholstering Co., Inc." and that by virtue of this use, and by virtue of the distinctive use of the mark "Simmons" by the Plaintiff, there is no dilution of the Plaintiff's rights nor likelihood

of confusion between the products of the Plaintiff and the services rendered by the Defendants.

31. The Plaintiffs' have lost whatever rights they may have had to the mark "Simmons" by virtue of their indiscriminate allowance of the use of the word "Simmons" by others not associated with or controlled by the Plaintiff.

32. The Defendants and their predecessors have used the mark "Simmonds" in connection with services from a time prior to the Plaintiff's use of the mark "Simmons" for furniture or the like and consequently Defendant has superior rights in the mark "Simmonds" to any rights the Plaintiff may have.

WHEREFORE, Defendants pray that this action be dismissed with costs and reasonable attorneys fees and such further or additional relief as the court may deem just.

SIMMONDS UPHOLSTERING COMPANY
(s) DAVID WOLF
December 1, 1958 By Ezekiel Wolf, Wolf & Greenfield
SIMMONDS UPHOLSTERING COMPANY INC.
December 1, 1958 By (s) Same
NEW ENGLAND UPHOLSTERING CO., INC.
December 1, 1958 By (s) Same

MOTION TO AMEND DEFENDANTS ANSWER

Now comes the Defendant, Abraham Baker and moves that the answer to the complaint be amended by adding the following paragraph:

"Defendant Abraham Baker does not now and has not for more than six years prior to the filing of the Complaint, been engaged in business as a proprietorship under the name Simmonds Upholstering Company; nor has Abraham Baker, other than as an officer or employee, of a corporate

entity, or as a stockholder in a corporate entity, had any connection with the utilization of the name "Simmonds" in the furniture reupholstering field or in other allied or similar fields."

Respectfully submitted,
ABRAHAM BAKER, d/b/a Simmonds Upholstering Co., Inc. et al
By (s) DAVID WOLF

Sept. 15, 1959

MOTION TO AMEND ANSWER

Defendants move the court for leave to amend the answer by inserting paragraphs 33-41 in the attached AMENDMENTS TO ANSWER after paragraph 32 of the answer.

Respectfully submitted,
EZEKIEL WOLF, WOLF & GREENFIELD
By (s) DAVID WOLF

AMENDMENTS TO ANSWER

33. Section 33b (7) of the Trademark Act of 1946, 15 U.S.C. 1115b (7), bars the plaintiff from the requested relief because the mark whose use is charged as an infringement has been or is being used to violate the antitrust laws of the United States.

The plaintiff registered a certification service mark in the Patent Office which it has used and is using improperly because a license to use said mark is tied to a condition that the licensee use only mattresses manufactured and sold by the plaintiff. The alleged "inspection services" rendered by the plaintiff in connection with said mark are merely a sham.

34. On June 9, 1955, plaintiff applied for registration of a certification service mark SLEEP BEST ON BEAUTYREST BY SIMMONS, allegedly to indicate that the establishment

which displays said mark has been inspected by plaintiff and that it maintains plaintiff's standards with respect to equipment maintenance and operation of services in providing lodging in hotels, motels and tourist courts. In a letter dated January 19, 1956 from the Patent Office, registration was refused for a number of reasons, one being that the mark, as applied to the alleged services, so resembled the mark SIMMONS, Registration No. 532,319 that confusion, mistake or disception would be caused by such registration. The latter reason for rejection was overcome in a letter dated July 9, 1956 in which the plaintiff amended the application to claim ownership of Registration No. 532,319 for the mark SIMMONS. The plaintiff acknowledged that a license to use the mark SLEEP BEST ON BEAUTYREST BY SIMMONS was tied to a condition that the licensee equip all beds for guests with mattresses sold by the plaintiff to the exclusion of mattresses sold by competitors.

35. In a Patent Office letter dated October 12, 1956 registration was again refused with the Examiner stating:

> The principle purpose of the agreement is to sell products manufactured by the applicant. The entire agreement is directed to the sale of products . . . it is the opinion of the Examiner that the "inspection" service is merely incidental to the applicant's promotion of the sale of its products and is not a service rendered apart from the sale of the products.

36. In fact, the alleged "inspection" service consists primarily of a simple return card from the licensee certifying that the circumstances described in the original application filed by the licensee continue to hold true and stating the progress of the licensee under its committments to become a hundred per cent equipped with "Beautyrest" mattresses sold by plaintiff to the exclusion of mattresses sold by competitors of the plaintiff.

37. Roadside signs bearing the mark SLEEP BEST ON

BEAUTYREST BY SIMMONS were leased to licensees on condition that licensees equip all beds for guests with "Beautyrest" mattresses sold by the Plaintiff to the exclusion of mattresses sold by competitors. This condition is a tying clause prohibited by Section 3 of the Clayton Act, 15 U.S.C. § 14.

38. In order to overcome the rejection of the Patent Office, the Plaintiff fraudulently argued that the reason for its seeking registration was only to protect the good-will of its business, as well as the sleep and comfort of the traveling public. In fact, the purpose of obtaining said registration and negotiating license agreements thereunder was to increase the sales of the Plaintiff's mattresses to motel owners to the exclusion of sales of competing mattresses.

39. The market for motel mattresses is a separate market from the market for mattresses used in households because price, quality and distribution channels are different. Plaintiff is the largest seller of motel mattresses in the United States.

40. Plaintiff is misusing the mark SLEEP BEST ON BEAUTYREST BY SIMMONS in an attempt to monopolize and has made agreements and conspired with others in an attempt to monopolize the motel mattress market in violation of Sections 1-3 of the Sherman Act, 15 U.S.C. §§ 1-3.

41. Plaintiff comes into equity with unclean hands because it uses and has obtained a registration of a mark including the name SIMMONS in a manner prohibited by the Lanham Act and the antitrust laws.

Respectfully submitted,
EZEKIEL WOLF, WOLF &
GREENFIELD
By (s) DAVID WOLF
Attorneys for Defendants

MOTION FOR SUMMARY JUDGEMENT

The defendants respectively move the Court to grant summary judgement on their behalf because facts not in dispute establish that as a matter of law:

a. The plaintiff is barred from maintaining an infringement suit because it has been and is using the mark SIMMONS to violate the antitrust laws of the United States.

b. The plaintiff comes into equity with unclean hands because it obtained a registration of a mark related to the one in suit on the basis of misleading and false statements made to the Patent Office.

c. The plaintiff is estopped from preventing the defendants from using SIMMONDS OR SIMMONDS UPHOLSTERING COMPANY because the plaintiff delayed bringing suit for more than seven years after learning of SIMMONDS UPHOLSTERING COMPANY with its sole excuse being that it thought defendants would collapse and go out of business while defendant SIMMONDS UPHOLSTERING COMPANY has spent much time and money in promoting its name by extensive advertising so that its annual business multiplied considerably during the period of the inaction by plaintiff.

Respectfully submitted,
HALE AND DORR
By (s) C. K. HURLEY
EZEKIEL WOLF, WOLF & GREENFIELD
By (s) DAVID WOLF
Attorneys for Defendants

DEFENDANTS' MOTION TO AMEND ANSWER.

Now come defendants in the above entitled case and move for leave to further amend their answer by adding thereto the following paragraphs:

42. The mark defendants are charged with infringing has been or is being further used by plaintiff to violate the anti trust laws of the United States, to wit, Subsection (d) of Section 2 of the Clayton Act as amended (Title 15 U.S.C. Section 13).

43. The conduct of plaintiff constituting said violation is as follows:

(a) In the course and conduct of its business in commerce, during the years 1959 and 1960, plaintiff paid or contracted for the payment of something of value to or for the benefit of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to me by said plaintiff and such payments were not made available on proportionally equal terms to all customers competing in the sale and distribution of products purchased from plaintiff. For example, since January 1, 1959, plaintiff has been using the Simmons Co-operative Advertising Plan, also known as SCAP, the terms of which are tailored to exclude all but respondent's larger customers.

(b) As an example of this plan, during the year 1959, plaintiff contracted to pay, and did pay, to John Wanamaker and to Lit Bros., both of Philadelphia, Pennsylvania, amounts exceeding $2,400 and $4,000, respectively, as compensation or as allowances for advertising or other services or facilities furnished by or through said John Wanamaker and Lit Bros., in connection with their offering for

sale or sale of products sold to them by plaintiff. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with John Wanamaker and Lit Bros. in the sale and distribution of products purchased from plaintiff.

(c) Plaintiff has similarly favored other large customers in Boston, Philadelphia and in other cities over competing customers in such cities.

44. By virtue of said violation plaintiff is barred under Section 33b (7) of the Trademark Act of 1946, 15 U.S.C. Section 1115b (7), from the relief requested in this suit, and is further barred from obtaining said relief by virtue of coming into equity with unclean hands.

By their attorneys,

(s) C. KEEFE HURLEY

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

SIMMONS COMPANY, *Plaintiff* v. ABRAHAM (ABE) BAKER, as an individual and also d/b/a SIMMONDS UPHOLSTERING COMPANY SIMMONDS UPHOLSTERING CO., INC. SIMMONDS SALES SYSTEM, INC. AND NEW ENGLAND UPHOLSTERING CO., INC., *Defendants.*	Civil Action No. 58-1014-S

MOTION FOR RECONSIDERATION OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Now comes the defendants in the above-captioned civil action and respectfully move that the Court reconsider its decision of September 14, 1960 denying defendants' motion for summary judgment.

REASONS

The court bases its decision on a finding that there are facts in issue, stating in its memorandum of September 14, 1960 what those issues are. We have underlined in red in the attached copy of the memorandum those facts which the court states are in issue.

For the purposes of the defendants' motion for summary judgment, the defendants accept as true the plaintiff's allegations on those facts underlined in red. With

respect to any factual matter not mentioned in the court's memorandum, defendants will accept plaintiff's allegations of fact stated in its complaint or in any papers on file with the Court as being true for the purposes of their motion for summary judgment.

Since the defendants are willing to admit for purposes of this motion all the allegations of fact heretofore made by the plaintiff, there cannot be factual issues in dispute.

On such a record defendants are entitled to judgment as a matter of law. *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U.S. 489 (1942); *Park-In Theatres* v. *Paramount-Richards Theatres*, 90 F. Supp. 730 (D. Del.), *aff'd*, 185 F2d 407 (3d Cir. 1950); *cert. denied*, 341 U.S. 950 (1951), *Dixon* v. *American Telephone & Telegraph Co.*, 159 F2d 863 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947).

s/ C. Keefe Hurley
C. Keefe Hurley
Hale and Dorr
David Wolf
Charles Hieken
Ezekiel Wolf, Wolf & Greenfield

CERTIFICATE OF SERVICE

I, David Wolf, one of the attorneys for the defendants in the above entitled action, hereby certify that I have served copies of the above Motion for Reconsideration of Defendant's Motion for Summary Judgment by delivering in hand to Donald R. Anderson, Esq., Hill, Barlow, Goodale & Adams, 53 State Street, Boston, Massachusetts, and by mailing postage prepaid to Francis A. Even, Esq., Soans, Anderson, Luedeka & Fitch, 135 South LaSalle Street, Chicago 3, Illinois, counsel of record for the plaintiff, this sixteenth day of September, 1960.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 58-1014-S

SIMMONS COMPANY

v.

ABE BAKER, ET AL

MEMORANDUM ON MOTION

September 14, 1960

McCarthy, D.J. (Retired, sitting by designation)

In this action for alleged infringement of a trademark owned by the plaintiff, the defendants have moved for summary judgment on three distinct bases: 1. That the plaintiff has used its trademark in violation of the anti-trust laws; 2. That the plaintiff does not have clean hands; and 3. That the plaintiff has been guilty of laches. After hearing and deliberation, the motion must be denied because material facts are in dispute as to each of the grounds raised by the motion.

1. The acts allegedly committed by the plaintiff in use of its trademark which give rise to the charge of alleged violation of the anti-trust laws are in dispute. The defendant alleges that the plaintiff used the embodiment of its trademark in a sign as a "tying" article and that plaintiff's mattresses were the "tied" article. Defendant further alleges that this "tying" resulted in violations of the Sherman and Clayton Acts. Plaintiff alleges that there was no "tying" in the monopolistic sense, offering evidence that any persons who leased the "tying" article and

agreed to purchase of the "tied" article were free to withdraw at any time. There is no undisputed fact which gives rise to a basis for finding, at this time, that plaintiff has been guilty of violation of the anti-trust laws.

2. The basis of plaintiff's unclean hands lies in allegedly false statements made by the plaintiff to the United States Patent Office in connection with plaintiff's application for a trademark upon a symbol which incorporates the mark which is the subject of this suit. The defendant's theory, apparently, is that the plaintiff stated to the Patent Office under oath that the mark sought to be registered was something more than a mere incident or aid to the sale of mattresses and that this was false. Evidence of the falsity supposedly comes from the same evidence which gives rise to the charge of anti-trust violation. This evidence is in dispute.

3. The charge of plaintiff's laches arises from plaintiff's admission that it knew of the existence of defendant for about seven years before it instituted this suit. In opposition to this ground for summary judgment plaintiff has offered voluminous proof of alleged fraud on the part of defendant. This gives rise to a factual dispute which causes denial of the motion for summary judgment on this ground also.

At hearing on the motion for summary judgment the defendant filed a motion to expunge certain portions of the plaintiff's brief and to expunge an affidavit made and filed by plaintiff's trial counsel. In light of what has been ruled above, the motions are denied.

Without reducing the matter to a formal motion, defendant, on argument, suggested to the court the possibility that this case might be certified for interlocutory review by the Court of Appeals if I should deny the motion. I have considered doing just this but have decided against it since I do not believe that this case is ripe for

interlocutory review within the terms of section 1292 of Title 28 of the United States Code.

The case will stand for trial. Of course, nothing herein will bar defendant from raising the same defenses to this action during the course of the trial by presenting evidence and making appropriate motions.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 58-1014-S

SIMMONS COMPANY

v.

ABRAHAM BAKER, ET AL

MEMORANDUM ON MOTION

September 19, 1960

McCarthy, D. J. (Retired, sitting by designation)

The defendants have filed a motion seeking reconsideration of the ruling of the court on defendant's motion for summary judgment. Defendants in their latest motion state that they accept the plaintiff's allegations of fact for the purpose of this motion. In this case the motion for summary judgment is denied as matter of law, since, on examination of the entire record, I can find no grounds for allowing the motion.

S/ McCarthy J.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

November 15, 1961

FINDINGS OF FACT

A. THE SUIT

1. This is an action for infringement of federally protected trademarks, for infringement of trademarks protected by the common law, and for unfair competition. The important defenses relied upon were laches and the doctrine of unclean hands, the unclean hands allegedly arising from violations of the provisions of the Lanham Act by the plaintiff corporation in that the plaintiff corporation allegedly used its registered trademarks in attempted monopolization in violation of the anti-trust laws and in that the plaintiff corporation attempted to monopolize the motel mattress trade in violation of the anti-trust laws, and further, that the plaintiff corporation's SCAP program constituted a violation of the provisions of the Robinson-Patman Act.

After an extensive trial, which covered fifty days in all, at which parties litigant were represented by most competent and courteous counsel, briefs were prepared and the merits argued.

B. THE PARTIES AND THEIR ORIGINS

2. Plaintiff originally was founded as a manufacturing concern in Wisconsin before 1884 by G. Simmons under the name "Northwestern Wire Mattress Company" and commenced the manufacture of woven wire mattresses. In 1884 the "Northwestern Wire Mattress Company", a corporation of Wisconsin, was formed to succeed to the business of Z. G. Simmons. In 1899 the Wisconsin corporation. "The Simmons Manufacturing Company", succeeded to the business. In 1913 the plaintiff "Simmons Company" was organized as a Delaware corporation to succeed to the busi-

ness and assets of "The Simmons Manufacturing Company".

3. The management of Plaintiff and its predecessor companies has always been in the family of the founder Z. G. Simmons, each president has had the surname "Simmons". The president of the company is a great grandson of the founder.

4. Since 1899, when the name of the business became "The Simmons Manufacturing Company", Plaintiff and its predecessor have used the name "SIMMONS" as a trademark on substantially all of the goods which Plaintiff has manufactured, also as a trade name, to identify goods sold by Plaintiff.

5. Defendant Abraham Baker is a Massachusetts citizen. He does business as "Simmonds Upholstering Company". He is the owner of the corporate Defendants Simmonds Upholstering Company, Inc., and New England Upholstering Company, Inc., and always owned the controlling shares of the defendant Simmonds Sales System, Inc. All corporate Defendants were organized under the laws of the Commonwealth of Massachusetts.

6. Defendant Simmonds Upholstering Co., Inc., was organized in 1950, and about 1952 it became the sales branch of the furniture business conducted by the Defendant Abe Baker. It sells upholstered furniture and re-upholstering service to the public in the New England States, New York and formerly in Pennsylvania. Defendant Simmonds Upholstering Co., Inc., also purchases and owns the upholstery fabrics used in the manufacturing process by Defendant New England Upholstering Company.

7. Defendant New England Upholstering Company was organized in 1946. It was and is the manufacturing arm of Abraham Baker, doing business as Simmonds Upholstering Company, and since 1952 has performed the same function for Defendant Simmonds Upholstering Co., Inc.

8. Abraham Baker, doing business as Simmonds Upholstering Company, concerns itself chiefly with the salvaging of furniture taken from customers of Simmonds Manufacturing Co., Inc., and the salvaging of waste materials from the manufacturing operation.

9. Defendant Simmonds Sales System is now dissolved but it was still a corporation for purposes of suit against it at the time this action was brought. It was organized in 1950 by Abraham Baker to expand the business through a system of franchises which were granted to established upholsterers and re-upholsterers in New York, New Jersey, Pennsylvania, and Michigan and which gave the franchise holders the right of defendants to use the name "Simmonds", together with methods, know how and other services of defendants.

C. GENERAL DESCRIPTION OF THE BUSINESS ACTIVITIES OF PARTIES TO THIS ACTION

10. Plaintiff manufactures furniture including bedding products, living room furniture convertible into beds, various types of upholstered furniture for institutions which include private schools and colleges, hotels, and motels, and upholstered living room furniture of a non-convertible nature since 1958, all of which are sold under the name "Simmons" throughout the United States.

11. Furniture manufactured by Plaintiff includes bed springs, bed steads, mattresses, cabinet beds, and in-a-door beds; various kinds of upholstered furniture convertible to beds, such as day beds, lounges, sofa beds, and the like; hospital beds and other institutional furniture including chairs, cabinets, dressers, chests, wardrobes, etc.; upholstered furniture of various types for general use; and wood and metal furniture of many kinds.

12. Plaintiff has thirteen manufacturing plants located throughout the United States from East to West, including

one at Medford, Massachusetts, and three in other Eastern coastal states. It has sixty-six distribution warehouses. Plaintiff does, and has done for many years, a substantial volume of wholesale business in furniture and bedding nationally and in the New England area.

13. Plaintiff has spent great sums in advertising its products and in establishing the name SIMMONS in the mind of the public. In the last twenty years, it has spent an average of two million dollars per year for advertising. Most of this expenditure was for advertising in magazines of national circulation, and in all such advertisements, the Plaintiff's name "Simmons" was prominently displayed.

14. Plaintiff's name and reputation are well-known to householders throughout the United States. Its right to the name "Simmons" has been vindicated in controversies against persons or concerns who have used the name "Simmons" or simulations thereof on related merchandise and who either discontinued or were enjoined from such use.

15. Abraham Baker began a retail furniture business in Lawrence, Massachusetts, in 1935 under the name "Baker Furniture Company", which he continued until 1945. Baker began the upholstering business under the name "Simmonds Upholstering Company" in about 1943, on the premises of Baker Furniture Company. When he began the Simmonds Upholstering Company, in 1943, it is the considered judgment of the Court that the Defendant Baker knew and had known the Plaintiff's activities in this field and its reputation.

16. Plaintiff and Defendants are in competition in the sale of furniture. Plaintiff sells new upholstered furniture to retailers who sell it to the public. Defendants reupholster old furniture and also manufacture new upholstered furniture which they sell to the public by inducing customers to order their furniture restyled. Some of this

"restyled" furniture is also sold direct as new furniture. More than sixty per cent of Defendants' manufacture is of such allegedly "restyled" furniture, which is essentially new furniture with the exception that Defendants employ cotton filling salvaged from old furniture, but not necessarily the customer's own. Furniture ordered restyled is delivered quicker than furniture ordered only re-upholstered.

17. Defendants advertise extensively under the name "Simmonds Upholstering Company" via newspapers, radio, and television throughout New England, and parts of New York and Pennsylvania. The gross sales of the Defendant Corporation were as follows: (in millions of dollars) '59:2.4; '58:2.0; '57:2.45; '56:2.6; '55:1.7; '54:1.8; '53:1.65; '52:1.0; '51:1.2; '50:.9; '49:.6; '48:.55; '47:.4; '46:.25; '45:.2; '44:.1. These figures are graphically shown by Defendants' exhibit in support of Motion for Summary Judgment.

D. JURISDICTIONAL FINDINGS

18. The amount in controversy exceeded the amount of $10,000.00 exclusive of interest and costs.

19. The Defendants used the name "Simmonds" in interstate commerce.

20. Plaintiff corporation registered its mark "SIMMONS" in the United States Patent Office on three different occasions. All of the registrations are unrevoked and uncancelled.

E. CONFUSION

21. I find on all the evidence that the name "Simmonds" as it has been used in the conduct of the DEFENDANT'S business is indistinguishable when spoken from "Simmons", has been of a most confusing character, and that its use by the Defendants has not only in the past, but is likely in the future to cause confusion among the purchasing public in New England and elsewhere.

22. The Court finds that the name "Simmonds" has caused actual confusion in the minds of the general public. The Plaintiff corporation has received numerous inquiries and complaints about the character of the work done by the Defendant company which were intended for the Defendants. The Better Business Bureau of Metropolitan Boston received complaints from Defendants' customers who were under the impression that they had been dealing with Plaintiff. Defendants' salesmen received inquiries from customers in Massachusetts, in Rhode Island, in New Hampshire, in Connecticut and in New York as to whether they were connected with Plaintiff, and some of those salesmen told customers that they represented the Plaintiff. This is further evidenced by misdelivery to the Plaintiff by the United States Post Office of mail addressed to "Simmonds, Boston".

23. It is inescapably clear from an examination of the evidence that the Defendants knew that their use of the name "Simmonds" not only was likely to cause confusion in the public mind to the harm of the Plaintiff, but they also knew that customers were confusing them with the Plaintiff. The Court finds that the Defendant company knew that some of their salesmen were representing themselves as employees of Plaintiff or of a subsidiary of Plaintiff, or were failing directly or indirectly to inform a confused customer of the difference.

F. DEFENDANT' RIGHT TO USE NAME "SIMMONS".

24. Defendant's allegedly asserted right to use the name "Simmonds" is predicated upon an alleged bill of sale dated December 4, 1940, which in plain words conveyed to Abe Baker the "Simmonds Upholstering Company", established in 1899 and located on the date of the bill of sale at 471 Main Street, Bradford, Massachusetts. The Defendant Baker asserted his right in this suit and in an

earlier suit brought by the Simmonds Upholstering Company in the Superior Court of Rhode Island to enjoin another from using the Plaintiff's name "Simmons". It is clear that on all the evidence this document from "William B. Simmonds" is not authentic and therefore spurious, and was manufactured deliberately by Abe Baker in an attempt falsely to establish the right to the name of "Simmonds".

25. In December of 1940 the premises at 471 South Main Street, Bradford, consisted of a two-family dwelling and a garage. This has been clearly established by the testimony of previous owners.

26. The poll tax lists of Bradford, 1898 to 1942, have never shown a William B. Simmonds at 471 South Main Street, Bradford, and no "William B. Simmonds" ever registered to vote in Bradford, and the city directories of Bradford from 1898 to 1942 do not show either a William E. Simmonds nor a "Simmonds Upholstering Company". The Bradford-Haverhill telephone directories from 1926 to 1942 do not list a "William B. Simmonds" nor a "Simmonds Upholstering Company".

27. Lucian Jutras, who was hired by Simmonds Upholstering Company in 1950, testified that a short time after he was hired he saw five or six copies of bare printed letterheads, identical with that on which the purported Bill of Sale was written, in the hands of Baker's printer. Several months later, Jutras saw the "Bill of Sale", written out, on the desk of Baker's secretary and overheard Baker say, "It isn't aged enough". At a subsequent time, Jutras saw the original document lying on the window sill in Baker's office and was told by Baker that he was aging it. I find on all the evidence that the testimony of Lucian Jutras was true.

28. I find that the Defendant Baker stated to the Better Business Bureau of Metropolitan Boston in 1949 that he purchased the "Simmonds Upholstering Company" from

one "John P. Simmonds of Andover, Massachusetts", in 1938. This is also asserted in the handbooks used by the Simmonds Upholstering Co., Inc., to train its salesmen.

29. Abraham Baker, in a Consent Judgment entered in an action brought by the Federal Trade Commission, submitted that his claim that "Simmonds Upholstering Company" was founded in 1899 was false.

G. HARM TO PLAINTIFF'S NAME

30. The confusion between Defendants and Plaintiff, and the Defendants' fraudulent treatment of their customers tend to injure the good name of Plaintiff.

31. Defendants used "bait" advertising to mislead customers into believing that Defendants will reupholster and "restyle" their furniture at a low cost. Defendants, in fact, whenever possible, declined to sell at the advertised price and attempted to induce customers to buy a much more expensive "reupholstering" job. In instances where the sales were made at the advertised price, the defendants acting through agents, by various expedients, declined to honor the sale. In more than 60% of their sales, no portion of the article of furniture which the customers sent out to be reupholstered or "restyled" was returned to them, but in their place were returned completely different articles, and the customer's own furniture, without his knowledge, was stripped for salvage of its padding, or, if it was in good enough condition, was sold by the Defendants. The majority of the unit sales of the Defendant were in the $200 to $300 price range, to which many of the customers were manipulated by over-stating the yardage requirements for reupholstering and the cost of the materials to be used, with the Defendants further profiting from the salvage or re-sale of the customer's own furniture.

32. Over 600 complaints have been received by the Boston

Better Business Bureau and, in the case of confused customers, many complaints also were received by Plaintiff which indicated dissatisfaction with Defendants' work and methods of doing business.

H. LACHES

33. Plaintiff corporation became aware of the existence and activities of the "Simmonds Upholstering Company" for the first time in the summer of 1951 because of advertising which appeared in the New York City newspapers. The Simmonds Upholstering Company was promptly notified that it was infringing Plaintiff's registered trademark. Defendants, through their New York attorneys replied to Plaintiff in November of 1951, and declared there was no confusion, but declined to answer the Plaintiff's subsequent inquiry as to whether or not there was any person in the Defendants' organization whose name was "Simmonds".

34. Soon after the first awareness of the "Simmonds Upholstering Company" in New York, the Plaintiff learned that the Federal Trade Commission, the Department of Internal Revenue, and other governmental agencies were taking action against the Defendants. During the pendency of the Federal Trade Commission's action the Defendants' franchise system suddenly collapsed and the "Simmonds Upholstering Company" disappeared from all the more westerly cities in which it had appeared.

35. It is inescapably clear that the Plaintiff corporation was misled by the Defendants' false claim that "Simmonds Upholstering Company" was established in 1899, and Plaintiff had no means of establishing the falsity of Defendants' claim until after October 1957, when Mr. Baker testified in his successful suit in the Superior Court of Rhode Island of an alleged transaction between him and one "William B. Simmonds", at which time an alleged "Bill of Sale" was produced, but I am not convinced either that the Defendant has sustained his burden of proving by a preponderance

of the evidence that the circumstances surrounding the advertising and the notice already described in paragraph 33 is sufficient, in the light of all the other facts and circumstances, to show laches on the part of the plaintiff.

36. In 1956, Defendants' "Simmonds Upholstering Co., Inc." applied for registration of the name "Simmonds" in the United States Patent Office upon Defendant Baker's oath that the name had been continuously in use by the Applicant's its predecessors since 1899. After the name "Simmonds" was published by the Patent Office for opposition, Plaintiff filed opposition in September 1957, and raised the issue of fraud. After Plaintiff subpoenaed Abe Baker in that action, Simmonds Upholstering Co., Inc. confessed judgment in favor of Plaintiff and abandoned the application. This Consent to Judgment was filed in the Patent Office on April 28, 1958.

37. The suit by the Plaintiff company then followed on October 10, 1958.

38. Plaintiff did not acquiesce in the Defendants' use of the name "Simmonds" and brought this action within a reasonable time after the re-emergence of "Simmonds Upholstering Company," and the means of establishing the falsity of Defendants' claim to the name "Simmonds" became available.

39. I find as a fact that defendants have not maintained their burden of proof on the issue of laches.

I. SCAP

40. Simmons Cooperative Advertising Plan (SCAP) reimburses Plaintiff's dealers for money which they spend in advertising of Simmons' mattresses other than the Beautyrest mattress. The dealer accrues a credit of $.75 per such mattress purchased from Plaintiff and this credit is applied to the dealers' cost of advertising such mattresses in news-

papers. Plaintiff reimburses the dealers to the extent of one-half the cost of such newspaper advertising.

41. To be eligible for the SCAP plan, the dealer must maintain a specifically enumerated floor display of Plaintiff's products having a total wholesale value approximating somewhat less than $1,000.00. In addition, the dealer is required to covenant that he will not pay, or permit any manufacturer competing with Plaintiff to pay to his floor salesman for his sale of any mattress competitive with plaintiff's mattresses, price class for price class, a P.M. ("push money") or "spiff" greater than that paid to the dealer by Simmons.

42. In order to obtain the dealers' commitment, Plaintiff, after notifying the dealers to see their Simmons representative if they wished to become parties to this arrangement, sent each District Manager to sign up a SCAP contract with each of the dealers who indicated a desire to participate. Plaintiff sent written notice of SCAP to its dealers.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and of the subject matter.

2. Plaintiff has the exclusive right to use the word "SIMMONS", including any simulation thereof, as a trademark or tradename in connection with the manufacture, sale, or repair of furniture and bedding.

3. United States trademark registration Nos. 137,699; 522,319; and 548,280 are valid; Plaintiff is the exclusive owner thereof and of all rights pertaining thereto; Plaintiff's right to use the registered mark has become incontestable under 15 U.S.C. 1065; and the certification of said registrations are conclusive evidence of Plaintiff's exclusive right to use the name "Simmons" in commerce or in connection with the goods specified in said certificates, under 15 U.S.C. 1115 b.

4. Defendants' use of the name "Simmonds" in the conduct of their business was intended and calculated to cause, was likely to cause, and has caused confusion with the Plaintiff among ordinary purchasers, and constituted unfair and unlawful competition, and therefore has infringed upon Plaintiff's rights in its name and trademark "Simmons" under said Federal trademark registrations and under the common law.

5. Defendants' fraudulently prepared Bill of Sale, which purported to give them a right to use the name "Simmonds", was intended to be used, and was actually used by them as a means not only to deceive this Court, but also had been used successfully to deceive another Court to believe that the Defendants had in fact succeeded to a pre-existing "Simmonds Upholstering Company" and had lawful claim to the name. I make this finding with complete exoneration of the distinguished counsel who came into this case long after this suit was brought.

6. Plaintiff was misled by the deception of Defendants in representing that they were established in 1899. Its failure to bring this action promptly after learning of Defendants' use of the name "Simmonds" was excusable and does not constitute laches or estoppel in view of the fraud and deception practised by the Defendants.

7. The Defendants have operated their business in a manner which is contrary to the interests of the public and in a manner which injures the good name of the Plaintiff, thereby causing damage to the Plaintiff.

8. The evidence in this case has not satisfied the Court that the Beautyrest Sign Program or Simmons Cooperative Advertising Plan is a violation of the Anti-Trust Laws.

9. The defense of unclean hands was not proved.

10. Plaintiff is entitled to a permanent injunction enjoining the Defendants, and each of them, from using the name "Simmonds", and from using any other name or repre-

sentation which would lead the public to believe that Defendants are associated with the Plaintiff.

11. Plaintiff is also entitled to damages to be determined at further hearing, and to its attorneys' fees, disbursements, and costs in this action.

ADDITIONAL FINDINGS OF FACT

12(a). Plaintiff's annual volume of business nationally and in the New England area was as follows:

	National	*New England*
1927	29,817,009.00	853,558.00
1930	28,124,946.00	1,153,527.00
1935	20,884,165.00	685,892.00
1940	30,591,711.00	1,242,177.00
1945	37,739,703.00	749,447.00
1950	109,879,358.00	4,470,312.00
1955	123,721,318.00	4,284,311.00
1959	115,257,236.00	3,609,240.00

INJUNCTION

November 16, 1961

After hearing upon the merits in the above-entitled action and because of the findings of trade-mark infringement and unfair competition by the defendants it is

ORDERED the defendants, their agents, servants, employees and attorneys and all persons in active concert and participation with them be and they hereby are restrained and enjoined from using the name "Simmonds" and from using any other name or representation which would lead the public to believe that defendants are associated with the Plaintiff.

By the Court

November 16, 1961 (s) WALTER J. HURLEY
Enter: *Deputy Clerk*

(s) WILLIAM T. MCCARTHY
United States District Judge